United States Court of Appeals
for the Second Circuit

APPENDIX

76-7476

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United States Court of Appeals
For The Second Circuit

No. 76-7476

NEWBURGER, LOEB & CO., INC. as Assignee of Claims of David Buckley and Mary Buckley,
Plaintiff-Appellant-Cross-Appellee,

against

CHARLES GROSS, MABEL BLEICH, GROSS & CO., and JEANNE DONOGHUE,
Defendants-Appellees-Cross-Appellants,

NEWBURGER, LOEB & CO., a New York Limited Partnership, ANDREW M. NEWBURGER, ROBERT L. NEWBURGER, RICHARD D. STERN, WALTER D. STERN, and ROBERT L. STERN as Executors of the Estate of Leo Stern, ROBERT L. STERN, RICHARD D. STERN, JOHN F. SETTEL, HAROLD J. RICHARDS, SANFORD ROGGENBURG, HARRY B. FRANK and JEROME TARNOFF as Executors of the Estate of Ned D. Frank, FRED KAYNE, ROBERT MUH, PAUL RISHER, CHARLES SLOANE, ROBERT S. PERSKY, FINLEY, KUMBLE, WAGNER, HEINE, UNDERBERG & GRUTMAN, a Partnership, (formerly known as Finley, Kumble, Underberg, Persky & Roth and Finley, Kumble, Heine, Underberg & Grutman) and LAWRENCE J. BERKOWITZ,
Additional Defendants on Counterclaims-Appellants-Cross-Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

UNITED STATES COURT OF APPEALS
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JOINT APPENDIX—TRIAL TRANSCRIPT
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Q Had you been hearing claims about Charles Gross' role with New York Plaza in the fall of 1970?

A Yes, I had.

Q And had partners and limited partners and others connected with Newburger, Loeb attributed wrong-doing on Charles Gross' part to the problems that the firm had with New York Plaza?

A Partners had.

Q Fine.

And was that true in the fall?

A Yes.

Q And was that also true in the winter?

THE COURT: How does this affect anything?

MR. GRUTMAN: Your Honor was asking. Your Honor seemed to express some surprise at the first time he heard these things was when they were expressed second-hand by lawyers representing these people.

THE WITNESS: I didn't mean to convey that. If that is the impression I conveyed,that is the wrong impression.

THE COURT: I did not apprehend and I still don't apprehend the significance of the last ten minutes of testimony.

MR. GRUTMAN: By me?

THE COURT: No, by Mr. Risher because Mr. Risher testified at great length that his August 1970 problems, his and Muh's August 1970 problems included the getting rid of the basketball team, getting out of the clearing business, getting rid of the One New York Plaza, and I guess that is it.

MR. GRUTMAN: Cutting costs was the third.

THE COURT: And cutting costs and so for these now to be fed into him as complaints by other partners in October, November, and December, I don't understand what anybody wants me to draw from it because he already knew all about it.

MR. GRUTMAN: No, Judge, he knew the existence of the problems. The role that Charles Gross --

THE COURT: He had been trying to solve the problems.

MR. GRUTMAN: Those were the problems but the role that Charles Gross played in the creation of those problems is another subject which overlies the existence of them.

THE COURT: Nobody has ever explored then whether or not he learned in the course of ascertaining what the problem was how it came to pass because --

MR. GRUTMAN: That is what he has been testifying to.

THE COURT: I assumed that in the summer of 1970, August, he ascertained how these problems came to pass, the better to deal with them.

MR. GRUTMAN: Exactly fine.

THE COURT: Is that right?

THE WITNESS: Yes, and that occurred.

Q So would it be correct, Mr. Risher, that the problems existed that you told us about on your direct examination, correct?

A Yes, sir.

Q And you and Muh attempted to solve the problems?

A Yes.

Q And in addressing yourself to the solution to those problems did you come to learn through the fall and early winter of 1970 what role Charles Gross had played in this creation of those problems?

A I know what people told me about Mr. Gross' role.

MR. MANDEL: I object to that.

THE COURT: Yes, sustained.

MR. SHAW: I think the door has been opened on that.

THE COURT: Sustained. No, no.

Q The people that told you through the fall and early winter, were any of them general partners of Newburger, Loeb?

A Yes.

Q And likewise limited partners? Yes or no.

A Limited partners did not tell me of a role. General partners did, limited partners were aware of these things. I did not gain information from limited partners as a source as to Mr. Gross' role.

THE COURT: Mr. Grutman, I don't see that this has any enormous significance.

MR. GRUTMAN: I would like to leave it, except, your Honor, there seemed to be some problem that I may not still be apprehending.

THE COURT: That was my problem.

MR. GRUTMAN: Has that been clarified?

THE COURT: My problem was I couldn't see where Mr. Mandel was getting into these conversations as to what people told him when it was a subject that I assumed he already knew everything about.

MR. GRUTMAN: Very well, the problem is passed and we can go on to something else.

THE COURT: All right.

Q The arrangment made with the Finley, Kumble law firm concerning their compensation in the Buckley case you have told us was a contingent fee, is that correct?

A Yes.

Q Were the contingent arrangements a fixed percentage on the cash proceeds received in the event of success by suit settlement or otherwise?

A Yes.

Q And was the fee paid to Finley, Kumble in accordance with that retainer based on the cash which Newburger, Loeb received?

A Yes.

Q During the time that the Finley,Kumble law firm was acting on behalf of the corporation, did you put any limitations on what authority Finley, Kumble or Persky or anybody in the office had to act on behalf of the corporation?

A No.

Q Did you assume at all times that what Finley, Kumber and Persky were doing were in accordance with --

MR. MANDEL: One moment, please.

Your Honor, I am going to object to these leading questions.

THE COURT: Sustained. This last one.

MR. GRUTMAN: I heard Mr. Mandel.

MR. MANDEL: One moment, please, Mr. Grutman.

THE COURT: All . am doing is I am sustaining an objection to the last question starting out with an assumption about generalities.

MR. GRUTMAN: All right.

BY MR. GRUTMAN:

Q Some questions were asked of you concerning whether or not Mr. Persky had spoken with you on February 11th before the opinion letter was drafted. Do you recollect that?

A Yes.

Q At the time that Mr. Persky was representing the corporation, were there any limitations on what Persky was permitted to do on behalf of the corporation as lawyer?

A No, I relied on his integrity, and no limitations were placed there.

Q And did you expect Mr. Persky to do whatever was necessary and right that night?

A Yes.

Q You said that when the problem arose, it was one among many problems which occurred during that long February 11th meeting, is that correct?

A Yes.

Q And when Mr. Burak demurred in giving the opinion on behalf of the Rosenman firm, did you at that time have any awareness of the impact of such attitude by the Rosenman firm would cast on the whole transaction?

MR. MANDEL: I am objecting to leading.

THE COURT: Yes, sustained. We have had very specific testimony as to what he knew so just that general question --

Q Were there any problems that arose in the evening that seemed to have an impact like the Burak incident?

A I think the Burak incident probably was the largest problem that we had that night but it was not the only problem. We had a number of problems that night.

Q And were those problems negotiated and resolved out during the course of the closing?

A Yes, they were.

Q Were there other problems that had to be resolved after the Burak opinion problem was resolved?

A I don't remember.

Q Did you understand that after the Burak opinion letter was circulated, and opined upon and accepted, that it was not delivered until the last document in the transaction was signed?

A No, I didn't -- I don't know when it was delivered.

Q You are not a lawyer, is that correct?

A That is correct.

Q Would you tell us, Mr. Risher, in February of 1971, how old were you?

A I was 35.

Q Coming back to the various complaints and disagreements that had existed, on or about February 16th, Newburger, Loeb & Company, Inc. sued Charles Gross and Gross & Company; is that correct?

A That is correct.

Q You knew about it before the complaint was placed in the hands of the federal marshal, did you not?

A Yes.

Q And when the complaint was placed in the hands of the federal marshal, was that with the authorization and approval of Newburger, Loeb & Company, Inc.?

A Yes, sir.

Q And when prior to February 16th, and more particularly on or about February 5th or February 8th, when Mr. Persky and the Finley, Kumble firm had reduced to writing the gist of the grievances against Gross & Company arising out of the Buckley matter, was that something that was within Mr. Persky's authority to do as a lawyer?

MR. MANDEL: I object to that. It is a question without foundation, your Honor. This was done in the partnership name. This man --

THE COURT: Yes, sustained.

MR. GRUTMAN: But, your Honor, the partnership and the corporation was in a transitional stage. The December 31st agreement had already been signed. The Corporation wasn't simply nascent. It was a matter of technical formalities until it came into existence and to say I think with arid formality that the partnership had not yet transferred the assets as to ignore the reality of what was going on.

There was a corporation de facto that was already in existence and would acquire the assets on February 11th and for Mr. Mandel to insist upon this rigid idea that the partnership had not yet parted with it is to ignore what was going on.

THE COURT: I know but there is a lot more that goes into this than just that simple question. It is in the partnership name.

MR. GRUTMAN: All right, I will lay the foundation.

THE COURT: It charges the wrong person with certain acts so that it is a question of whether Persky was authorized to get up a piece of paper to --

MR. GRUTMAN: Judge, you just said two things which are of some concern to me and I want to address myself in subsequent questioning to those. One,you say it was in the partnership name. That is true and that we will deal with at another time with another witness. You then say it names the wrong person. I will concur with the Court that it misidentified who the registered representative handling the account was.

THE COURT: Who handled the transaction. It said Charlie Gross did.

MR. GRUTMAN: Well, that too is applicable, but is a matter of absolutely no legal consequence. If Gross & Company of which Charles Gross was a partner was in fact responsible, whether it was Jordan or Ordway or anybody with a tin horn would make no difference because Charles Gross would be legally responsible.

THE COURT: The thing that Mr. Mandel -- the action that he is raising which is what troubles me only as to your question.

MR. GRUTMAN: All right.

THE COURT: Not as to the fact, only as to your question, whether Mr. Risher had authorized Mr. Persky to charge Mr. Gross with something he had not done, that somebody else had done. That is what troubles me about your question.

MR. GRUTMAN: That is a different question, Judge.

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THE COURT: Implicit in your question is all of these little wrinkles.

MR. GRUTMAN: I am going to try and deal with those short hairs.

Q Mr. Risher, at the time of the Buckley settlement, which was in December of 1970, did you know of the existence of a man named Charles Jordon?

A No.

Q Did you know whether or not Gross & Company consisted of anybody else other than Charles Gross?

A No.

Q Were you aware that when the settlement had been effected on or about December 17th, there was an assignment to Newburger, Loeb & Company of whatever claims Buckley had against Gross & Company?

A Yes.

Q And in the period subsequent to Decmeber 31st, when the so-called agreement in principle was signed, and after the release had been signed by, or the various papers in the Buckley settlement with Webster, Sheffield, was it contemplated that whatever claims were embrased in the assignment would pass over to the corporation by reason of the transfer agreement?

MR. MANDEL: I object. It is leading; and it

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calls for a conclusion.

THE COURT: Overruled.

Go ahead.

A Absolutely.

Q And when Mr. Persky continued to negotiate with Gross and his representative, were you aware that among other things they were discussing the Buckley claim?

A Yes, but that was not the only claim.

Q I understand that. But the Buckley claim was among other claims which Mr. Persky was discussing with Gross and his lawyer, and you knew that, did you not?

MR. MANDEL: I am objecting to this, your Honor, because it is without foundation as well as being leading. He is talking about certain unnamed negotiations. So far we have been speaking here about definite meetings between Mr. Persky and persons representing Gross and so forth.

Now, Mr. Grutman is leading Mr. Risher into testifying about unidentified meetings or negotiations at which he probably did not attend, probably never took place.

THE COURT: The issue I think is very simple. Was Mr. Persky representing this nascent corporation and the partnership both at this point?

MR. GRUTMAN: At which point, your Honor?

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THE COURT: February 5th when he presented Exhibit X.

MR. GRUTMAN: I don't think that question can be answered.

THE COURT: Then it is a question of in what capacity Mr. Risher was authorizing him to exhibit this instrument, if at all.

MR. GRUTMAN: Do you want me to deal with that?

THE COURT: That seems to me to be a threshhold question.

Q In this period, Mr. Risher, before February 11th, were there several law firms handling the affairs of Newburger, Loeb & Company?

A Yes.

Q Did that include Goldenbock & Barell for some of those matters?

A I believe Goldenbock & Barell's services had just been ended because Goldenbock & Barell had been left with the Buffalo Braves matter and unless there were still some open items on that transaction, perhaps it wasn't ended.

Q And did Osmond Frankel who I think was not an individual practitioner but a member of the firm of Hayes, St. John, et cetera, was his firm also involved?

A Yes.

Q And Finley, Kumble, was also handling some matters for the partnership?

A Yes, it was.

Q And was the Rosenman firm also handling some matters for the partnership, is that correct?

A Yes, it was.

MR. MANDEL: Matters.

THE COURT: Matters.

MR. GRUTMAN: Matters.

Q Would it be correct, then, Mr. Risher, that the large affairs of Newburger, Loeb & Company, the partnership, were being handled by several law firms, correct?

A That is correct.

Q Did you know that in negotiating with Mr. Mandel and Mr. Gross, that Mr. Persky was acting on behalf of the corporation?

A Yes.

Q And when Mr. Persky was pressing the existence of various claims against Mr. Gross, so far as you knew, was he doing that on behalf of the corporation?

A My mind hadn't run to that issue.

Q Address your mind to that issue, Mr. Risher.

A It really runs that there were claims.

Q Mr. Risher, the claims that have been spoken about --

THE COURT: He is not going to answer that for you. He thinks of them as claims. He doesn't think of them as corporate or partnership. He says his mind does not run to that. They are only claims.

Q Whether your mind ran to it or not, can you address yourself to it: in pressing Mr. Gross to accept the seriousness of those claims, was Mr. Persky doing so with your approval?

A Yes.

Q Was he doing so with your approval as the then chief operating officer of the partnership?

A Yes.

Q And was he doing so with your approval?

A To the extent that --

Q Just hear my question.

A To the extent that chief operating officer was meaningful.

Q All right, and was he doing so with your approval as one of the principal officers of the new corporation?

A Yes.

Q When you answered Mr. Mandel that you did not know in advance that Mr. Persky had drafted the form of the complaint which was exhibited to Mr. Mandel on February 5th, you were speaking about your own personal knowledge, is that correct?

A That is correct.

Q Do you know what conversations or dealings had passed between Mr. Persky and Mr. Berkowitz?

A No, I do not.

Q And Mr. Berkowitz at the time that the complaint was exhibited to Mr. Mandel, was he then still the general counsel of the partnership, the inside house counsel?

A Yes, sir.

Q Before you went to the meeting at which -- and I think it was on February the 8th -- where Mr. Mandel had a copy of the complaint exhibited to him --

MR. MANDEL: One moment please.

MR. GRUTMAN: Is that the wrong date?

MR. MANDEL: It is the wrong date and the wrong person. The testimony we have is that Persky gave it to Silverman and he said something to Silverman.

MR. GRUTMAN: Fine.

MR. MANDEL: If this witness didn't see it and didn't know, he shouldn't be led into more hearsay.

I object to the constant leading.

MR. GRUTMAN: No, he objects because it is hurtful

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to his cause. Not for any other reason.

Q Had Mr. Persky, before the complaint was exhibited to the lawyer on behalf of the Gross, Bleich and Donoghue interests it was shown to, discussed it with you on the way over to the meeting?

A I don't think so, no.

Q Or had he consulted with you in its preparation?

A No.

MR. GRUTMAN: I would like to conclude by asking one or two more questions.

Just a moment, please, your Honor.

(Pause.)

BY MR. GRUTMAN:

Q Mr. Risher, did the fact that there had been forgiveness of certain deficit partners' capital accounts become a fact which was made known to the limited partners?

A Yes.

Q And was it likewise made known to the subordinated lenders?

A Yes.

Q Did the subordinated lenders approve?

A Yes.

Q Did the limited partners approve?

MR. MANDEL: Which limited partners?

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MR. GRUTMAN: The limited partners who signed the transfer agreement which is to say everybody except your clients.

MR. MANDEL: That question I will accept.

MR. GRUTMAN: Right.

Q And was there any concealment of the fact of these forgivenesses to Mr. Mandel or the people who represented Mr. Mandel during the negotiations which went on when those forgivenesses were worked out?

A No, there was no concealment.

Q Even before February 11th?

A Never.

Q Were those forgivenesses made known to the New York Stock Exchange?

A Yes.

Q And to the SEC?

A I don't know about the SEC. I don't recall.

Q Could the deal have been made without those forgivenesses?

THE COURT: He has answered that about three times.

MR. GRUTMAN: All right. I would like to ask the one question which your Honor excluded when Mr. Risher was trying to answer it during the course of Mr. Mandel's cross examination.

Q Mr. Risher, would you tell us if the deal, that is to say the transfer agreement, had not gone through because of the obstruction or refusal of Bleich and Donoghue and all of the other limited partners and subordinated lenders had balked, what would have happened to whatever amount of capital belonged to Charles Gross, Mabel Bleich, and Gene Donoghue?

MR. MANDEL: I will object to that as calling for a prediction of events which did not occur.

MR. GRUTMAN: Based on his knowledge of what the state of the business was and its financial affairs.

THE COURT: You have just asked a question that would take an accountant a half hour of testimony to be authoritative about.

MR. GRUTMAN: No, your Honor. You allowed Mr. Mandel several times to put to Mr. Risher the question of what would have happened, you were forcing my clients to give up rights and to forego benefits and the like.

THE COURT: That is to get his state of mind that he believed to be so before a situation. This is going to the fact; as an accounting expert, and I don't see that you have laid a foundation to --

MR. GRUTMAN: Can I ask him his opinion?

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You had a lot of accounting opinion from him.

THE COURT: His opinion is not relevant to your case. His opinion for certain purposes it seemed to me was relevant to Mr. Mandel's cross examination. There is a vast different between the two.

MR. GRUTMAN: Your Honor, I think when you are talking about a conspiracy and you are talking about people's motives and people trying to steal corporations and take away valuable --

THE COURT: I am delighted to give you that answer, Mr. Grutman. Don't get nervous. Don't get excited.

MR. GRUTMAN: All right, I'm sorry, Judge.

THE COURT: I am delighted to permit you that answer if you can lay a foundation that this man knows what he is talking about.

MR. GRUTMAN: Very well.

THE COURT: But to ask him that question as your last question on redirect without any foundation --

MR. GRUTMAN: It is the last question.

Q Mr. Risher, do you have any knowledge of what the balance sheet of Newburger, Loeb was in December 1970?

A Yes, I did.

Q And did you have a knowledge of the continuing financial affairs of the company beyond December 30, 1970,

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into and up to February 11, 1971?

A Yes, I did.

Q Was that based upon your daily familiarity with the financial affairs of the company?

A Yes.

Q Now I will ask you --

THE COURT: What training have you had in accounting, bookkeeping?

THE WITNESS: I have had courses in accounting in college, and quantitative and economic analysis has been an important part of my career all through my career, particularly with McKinsey & Company where I was a management consultant for about four years.

Q Did you deal with balance sheets and profit and loss statements in your work?

A In depth.

Q In depth.

Now, based upon such in-depth, on the spot knowledge as you possessed through December and February of 1971, I ask you, Mr. Risher, if the transfer agreement had not gone through on the night of February 11th, and that by reason of the withheld consent of Bleich and Donoghue, or the other limited partners and subordinated lenders and general partners had balked, and the concern

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were suspended and then liquidated, based upon the then financial condition of Newburger, Loeb & Company, would Mr. Gross have gotten back his capital?

MR. MANDEL: Objection.

Q As a withdrawn general partner.

MR. MANDEL: One moment please.

THE COURT: This is an opinion.

MR. MANDEL: At best it could be an opinion and an opinion was not called for. The fact was called for.

THE COURT: I am taking it as an opinion.

MR. MANDEL: All right.

THE COURT: Of Mr. Risher based upon the experience that he states he has had in the field and what he has known. Go ahead.

A It is my opinion that Mr. Gross' book capital position would have been wiped out from the liquidation losses incurred and in addition substantial personal assets of his would have been at risk because there were not enough assets in the partnership to cover all the obligations.

Q What would have happened to the capital such as it was of Bleich in the event that the foregoing hypothesis had taken place?

A As a limited partner her losses were limited but all of her capital would have been wiped out.

Q And as to Donoghue, what would have been her position?

A The same answer. And these were my opinions and also the opinions of key --

THE COURT: No, no, just your opinion.

Q What is the basis for that opinion?

THE COURT: No, he stated it beforehand. Your basis of this opinion?

MR. GRUTMAN: That is correct.

THE COURT: All right, go ahead.

A An in-depth familiarity with Newburger, Loeb, its balance sheet, its obligations, the long-run nature of those, and my own business experience.

MR. GRUTMAN: I said that was my last question, I meant it.

REDIRECT EXAMINATION

BY MR. SHAW:

MR. SHAW: Let me see if I can take you up on that.

Q Would you direct your attention to the assets of Newburger, Loeb as of December 30, 1970, as shown in the financial statement. If there was a liquidation, if a liquidation ensued, do you have an opinion as to what would have been the effect of the liquidation on the assets as shown in the financial statement as at December 30, 1970?

A The December 31, 1970 Peat, Marwick financial statement showed assets of $3,699,000. I think there would have been a downward adjustment in those asset values of at least $400,000 in the event of liquidation.

Q Will you explain what you have just said? Give me the basis for that?

A Yes. Furniture, fixtures, leasehold improvements were on the books for $595,000. It is my belief and in discussing it with others, that the maximum that could have been realized.

MR. MANDEL: I object.

Q Strike that.

A The maximum that could have been realized on that would have been $100,000. That leaves a downward adjustment of $95,000.

The warrants were on the books and an equity value, Geon was on the books and had an equity value of a maximum of $100,000, and that had just recently occurred. The stock had been under water until just prior to that time. It was -- there was a registration problem. The warrants were not transferrable,but in order to err conservatively,I will attribute the full $100,000 value, which I think is tremendously on the conservative side.

Leaving a net write-down of assets of $400,000.

Q Would liquidation have had an adverse effect upon any of the other assets of Newburger, Loeb as shown in the financial statement as at December 31, 1970?

A There were certain miscellaneous assets and accounts receivable. The miscellaneous assets we could not have realized on all of those, and accounts receivable with the firm out of business, certain of those accounts receivable would have been difficult to collect as usually they are, for companies that are being liquidated.

But in the question you just asked me, I did not give effect to those downward adjustments; and just in order to err on the side of conservatism.

Q Subsequently, Newburger, Loeb Corporation, by virtue of the various notes executed by some of the partners in deficit capital positions, received approximately $900,000, the source of which was tax refunds of taxes overpaid by various partners. Do you have any opinion as to what would have happened in the event of a forced liquidation with respect to that sum of money?

A Yes, those sums --

MR. MANDEL: Your Honor --

THE COURT: Sustained, that is speculative. Sheer speculation if not requiring expert testimony.

Q All right. Now, I believe that you indicated in your testimony that the warrants were carried on the financial statement as of the year ending December 31, 1970, correct?

A Yes.

Q And under what item were those warrants carried on the financial statement?

A They were carried as securities not readily marketable.

Q And was there a category of securities not readily marketable in the financial statement for the previous year ending December 31, 1969?

A No certified statement was prepared for that period of time. The most -- the closest in date, certified statements, was in April -- April 1970 statement, and a November 1969 statement.

Q And were the warrants referred to in those financial statements?

A I have not looked specifically at the November 1969 statement but I have looked at the April 1970 statement, and the warrants are carried as partnership capital in the April 1970 certified statement.

Q What do you mean by partnership capital?

A Part of the partnership assets. It is like securities and all our assets.

Q In which Mr. Gross had a 16-1/2 per cent interest, is that correct?

A That is correct.

Q Were the warrants carried as an asset in the December 31, 1969 statement?

A I think you mean the December 31, 1970 statement.

Q I'm sorry, no, I meant '69.

A I said there was not a December 31, 1969 statement.

Q Were the warrants in the name of Newburger, Loeb & Company?

A Yes, they were.

Q And was there one warrant for the Geon --

A Yes, there was.

Q -- Corporation?

A Yes.

Q And was there one warrant insofar as the computer company?

A Yes, there was.

Q And as of December 31, 1970, what was the market value of the Geon warrants?

A Well, I am really trying to err on the outside. I think the maximum price that Geon stock reached in the month of December was either $12 or $14 a share, and the striking price of the warrant was six and a fraction, and so I just added ten points to that, taking them up to $16 a share and multiplied it times the 10,000 saying there could have been a maximum paper equity which could not have been realized at that time and would not have been looked upon as such of $100,000.

Q And you say that the $100,000 could not have been realized. What do you mean by that?

A Well, in order to realize on it, a registration proceeding would have to go through and that takes time.

Secondly, the price of the securities go up and down, and during that period of time so-called warrants or unregistrered stock were trading at discounts of anywhere from 95 per cent to 50 per cent. The minimum discount for unregistered stock was 50 per cent; so --

Q Go ahead.

A So the only way of realizing on them was to go through a registration proceeding, and then exercising and selling the securities and to tell what they were worth would require seeing into the future.

Q And do you have an opinion as to what the apparent worth as of December 31, 1970, of the Geon warrants?

A Yes.

Q What is your opinion?

A My opinion is based on what I think you could have gotten if they were transferrable. These were not transferrable but if we made the assumption they were transferrable and sold them in an open marketplace, I think you could have realized 35 or 40 per cent of that equity value that I spoke of a moment ago, at a maximum, and maybe less than that.

Q Meaning what figure?

A Oh, you could have realized as little as ten cents, ten per cent.

Q Ten per cent of the figure was subsequently obtained, in other words approximately $16,000?

A Right.

Furthermore, they really weren't transferrable or salable to anyone else, so even if you could have realized that much, you couldn't have entered into the transaction.

Q What value was ascribed to the warrants in the Peat, Marwick December 31, 1970 financial statement?

A Cost, which was customary, and sound accounting practice.

Q What was the cost, $180?

A $180.

Q Subsequent to December 30, 1970 --

A Strike that, I am not sure what the cost was but it was a minimal cost. Probably less than $1,000. I have forgotten what the exact cost was.

Q Subsequent to December 30, 1970, was a time reached when Mr. Gross agreed to share any of the losses of Newburger, Loeb?

A No.

Q But subsequent to December 30, 1970, during the period when the Geon stock --

THE COURT: He was withdrawn general partner at that point, Mr. Shaw.

MR. SHAW: Yes, but for a period of 12 months still liable for the losses.

THE COURT: But he is not going to be entering into any transactions. So I don't see what the purpose of these questions are.

MR. SHAW: I think the purpose of it, your Honor, is this:

If you look at paragraph 8.3 of the agreement you will see that for a period of 12 months there is a certain type of liability, but the thing that I object to and the thing that I think is interesting and I can say this since the jury is not present, is that although Mr. Gross and Mr. Mandel contend that if the value of the asset goes up, he is responsible for -- he is entitled to the increase, his position is that if there is a loss during that period, he is not in any way responsible for any portion of that loss.

MR. MANDEL: Does your Honor want me to respond to any of this?

THE COURT: This is argument for a later point. No. Go ahead.

MR. MANDEL: That's right.

Q Mr. Grutman asked you certain questions with respect to the preparation and the display to Mr. Mandel of a proposed complaint under the name of Newburger, Loeb & Company against Mr. Gross.

As of this point, had you been advised by anybody that either Finley, Kumble or Mr. Berkowitz or Newburger, Loeb Company or the corporation had received a copy or the original of any notes dated September 15, 1970 of an interview between Mr. Silverman and with Mr. Gross present of Charles Jordon?

MR. MANDEL: I object to the form of that question. It incorporates a lot of statements for which there is no foundation and --

Q Let me withdraw it and I will make it very simple.

THE COURT: No, leave it stand. As of February 1971, had you ever seen any notes on an interview with Charles Jordon?

THE WITNESS: No, sir.

THE COURT: All right.

Q As of this day, have you ever seen those alleged notes dated September 15, 1970?

A No, sir.

Q When was the first time that you had learned that Charles Jordon, if you did so learn, was the person who handled the Buckley account in the sense of having contact with the customer?

THE COURT: Mr. Shaw, with him this is wholly irrelevant. I doubt that he ever saw interview notes in 50 cases out of 51, so --

Q Did you ever see the notes of Walter Tepper's interview?

A No.

Q Let me ask you this question:

The foregiveness that was executed between the various partners of Newburger, Loeb who were partners and who entered into this agreement of February 10, 1971, did that forgiveness have any effect at all on Charles Gross' capital account?

A No.

Q Will you give us the basis for that?

A Charles Gross' capital account was determined irrespective of any items of forgiveness. His capital account would respond to profits and losses of the firm and forgivenesses were not a loss or a profit to the firm.

Q If Charles Gross had a capital account of $129,000 as of December 31, 1970, or $300,000 as of that day, how would the forgiveness of an indebtedness between various partners in a deficit capital position not consented to or agreed by Mr. Gross in any way affect his capital account?

A It would not relate to his capital account.

THE COURT: Just a minute now.

You mean that if a million and a half dollars came into the firm that that wouldn't be in some way a protection to him of his capital account?

MR. SHAW: Protection.

THE WITNESS: Well, it wouldn't change the size of it. I answered his question in terms of whether it would change.

THE COURT: I know but I am getting down to what I think underlies this q[illegible]ion.

Q Let me ask you this question.

THE COURT: Wait a minute. Do we have an answer? It would be a million and a half dollars more protection to his capital only.

THE WITNESS: I can quibble with that some in that he now has had a suit directly against the partners relating to those forgivenesses so it wouldn't them come into the corporation.

It seems to me he has better protection that way than he would have had if it had come into the corporation.

THE COURT: On any given--and let's forget about suits and anything else--if a firm has a million and a half dollars more in it, it is in better shape and money that is already in it is better protected.

THE WITNESS: Unquestionably yes, sir.

Q How does that million dollars that the firm makes increase the capital account of a withdrawn partner who withdrew the previous year?

THE COURT: It doesn't. He says it doesn't and I accept that.

MR. SHAW: I just want to make that clear, your Honor.

Q So is it your opinion that the foregiveness of the indebtedness and the various payments by the deficit partners of sums of money to the partnership, that that had no effect upon the capital account of Mr. Gross relating to the fact that he was a withdrawn general partner?

A The size of his capital account would not change as a result of forgiveness or lack of forgiveness.

THE COURT: Let's take our break. Are you almost through, Mr. Shaw?

MR. SHAW: Yes, just a few points.

Q Now, there was introduced in evidence a point heading of brief indicating that $75,000 was the amount of the limited parntership capital account of Miss Bleich and Mrs. Donoghue. And you testified that in reality their capital accounts as of December 31, 1970 was $114,000.

Prior to the time the brief was prepared, did anybody who prepared the brief consult with you in any way with respect to that figure or that head note?

A No.

MR. MANDEL: I object. I object to that.

THE COURT: No, I will permit that.

THE WITNESS: The answer is no.

THE COURT: All right, go ahead.

Q A portion of your deposition was read into evidence and I would like to read another portion of your deposition at page 185.

THE COURT: Mr. Shaw, that is not permitted. This was not read as a deposition all by itself, as an adverse party. This was used on cross examination of a witness.

MR. SHAW: But I would like to read in the preceding portion of the excerpt that has been read.

THE COURT: For what purpose?

MR. SHAW: Merely to indicate that what was read did not indicate the entire story. To explain the subsequent --

THE COURT: That I will permit you to do.

MR. SHAW: All right.

Q Page 187, line 3:

"Q Now, did it ever come to your attention "--

THE COURT: What is this bearing upon?

MR. SHAW: This bears upon the testimony with respect to the Burak opinion and the transfer agreement of February 11th; and I am particularly addressing the Court's attention to lines 2 through 8 at page 188 which immediately precedes what was read; and puts what was read into context.

MR. MANDEL: Judge, I think I could object because the answer proposed to be put in is meaningless argument. However, I will trust your Honor's discretion to weigh this answer for whatever it is worth.

MR. SHAW: Can I read it in and save some time, your Honor?

THE COURT: Yes.

BY MR. SHAW:

"Q Now, did it ever come to your attention that the attorneys for Gross, Bleich and Donoghue contended that the partnership did not have the legal authority to make the proposed transfer agreement without the consent of Bleich and Donoghue?

"A Yes. Mr. Mandel I think you conveyed that thought to me.

"Q Some time in January of 1971?

"A (No response.)

"Q You don't know when?

"A You have picked the date but some time around that time, yes, sir.

"Q Did you ever hear anybody else discuss that question, sir?

"A Yes, I think I had already said that the question about whether the contents of Bleich, Donoghue and Gross were required came up in these meetings that we had. It was not in a major way and we didn't spend a lot of time on it and no one ever expressed the thought that it required their consent, and it was demonstrated by the fact that there was signatures at the end."

You gave those answers to those questions, correct?

A That is correct.

Q When for the first time did you learn that definitely there would be no signatures in behalf of Bleich and Donoghue to the transfer agreement?

A I suppose I was sure of Donoghue some time in January but I believed until the night of February 11th that it was liekly we would have Miss Bleich's signature to the agreement.

Q When did you learn without any question that you would neither have the signature of Bleich or Donoghue to the transfer agreement?

A On the night of February 11th.

Q The problem of whether they would or whether they wouldn't sign the transfer agreement was one of about how many problems during that period of time?

THE COURT: Mr. Shaw.

Q With respect to this transaction.

THE COURT: All right.

MR. SHAW: And just one further question.

THE WITNESS: A large -- it was a small part of a large number.

THE COURT: The question was one of how many? How many? Give us a total.

THE WITNESS: I don't know. A large number.

Q In what magnitude did you place this particular problem at that time?

A Important but not the most important.

MR. SHAW: No further questions.

THE COURT: All right, we will take our break. Are you all through with Mr. Risher?

MR. MANDEL: I will ask him one question.

THE COURT: Di it right now.

MR. GLATZER: I have a few questions, your Honor.

MR. MANDEL: Then I better wait.

MR. GLATZER: Three or four.

THE COURT: That is what, recross, redirect?

MR. GLATZER: Just continuing something that Mr. Grutman started.

THE COURT: What is it? We will take it after the break.

(Recess.)

MR. SHAW: Your Honor, I find I have forgotten to ask Mr. Risher one point.

REDIRECT EXAMINATION (Continuing)

BY MR. SHAW:

Q Mr. Risher, I am directing your attention to Exhibit FFF, which you have seen before. That is the minutes with respect to the meeting on February 5th, 1971, and at that meeting there was a conversation with a Spector Rafkind & Co. Do you recall that?

A Yes, I do.

Q Did you recall Mr. Mandel saying in that meeting that you have or there had been destroyed an employment opportunity or anything belonging to Mr. Gross?

A No, I do not recall Mr. Mandel having said that. He indicated earlier in his asking of the question that that's what those notes said, but they don't say that.

Q What do you recall Mr. Mandel saying?

A I recall Mr. Mandel indicating in that meeting that Mr. Gross needed capital to trade with. And I was under the impression that Mr. Gross was going to Rafkind & Co. Mr. Mandel made some comment about how it had been a mistake to write letters to Rafkind & Co. but that's all that he said in the meeting, and somehow thinking someone had not understood me and someone indicated they didn't understand me, they said the point is Mr. Gross has a trading opportunity without capital, he is going to work for Rafkind & Co.

Q What did you mean by that?

A I meant that Mr. Mandel's argument that Gross needed capital to trade was not correct, because he was getting trading capital by going to work with Rafkind & Co.

Q And how had you learned that?

A I don't recall specifically how I learned it, but the state of my mind was that I thought he was going to Rafkind & Co.

MR. SHAW: Thank you very much.

MR. GLATZER: Mr. Risher --

THE COURT: Just a minute, please. The only correspondence, the only input to Newburger, Loeb on Rafkind are the two Rafkind letters and the two Berkowitz responses, right?

Now, the two Berkowitz responses are negative. One is --

MR. SHAW: You mean equivocal?

THE COURT : They are not affirmative.

MR. SHAW: One of the responses your Honor draws Rafkind's attention to the covenant in the agreement and the other one says "It's up to you."

THE COURT: All I am trying to find out is, given that's all we have in the record, Mr. Risher, where do you recall hearing that Gross was going to work for Rafkind?

THE WITNESS: Those clearances ordinarily are given after someone goes to another firm, not before. It's a rather perfunctory kindof thing, and as there has been earlier testimony, usually in Wall Street they are oral and someone has already gone to another firm by the time the clearances are requested. That's usually afterwards.

THE COURT: But your clearance wasn't given so --

THE WITNESS: But it is very likely that someone said to me Mr. Gross is going to Rafkind & Co., and probably was already there, and those clearances were applied for after Mr. Gross had gone to Rafkind & Co. That would be the normal procedure in Wall Street is to ask after the fact, not before.

THE COURT: In any event, youdon't know --

THE COURT: I don't know.

THE COURT: -- where you got the impression that he was there or going there?

THE WITNESS: No, I do not know, but I do know that the sense of those notes made by Mr. Silverman was that he was at Rafkind & Co., and that he was going to be trading for Rafkind & Co., and that he did not have his own capital, he had capital supplied by Rafkind & Co.

THE COURT: All right.

RECROSS EXAMINATION

BY MR. GLATZER:

Q Mr. Risher, further with regard to the questions that have been asked you by Mr. Grutman, was the partners' assignment of their tax refund included in the December 30th preliminary agreement?

A I don't think so.

Q Had there been any reference to that matter or the so-called forgivenesses by December 30th?

A Oh, we knew that there would be forgivenesses by December 30th because at that time we were talking about basing the notes that the corporation was to receive on the November balance sheet.

Q Was Mr. Silverman aware of that situation by December 30th and thereafter in January?

A Yes.

Q When you had the meetings with Mr. Mandel on January 15th and then on February 5th and February 8th, was he aware of that fact?

A I think so.

Q And Mr. Gross?

A I think so.

Q And did they voice any objection whatsoever to the forgiveness or that circumstance at any of those meetings?

A I think me. Mandel in his questioning of me on deposition indicated that he said at the January 15th meeting that we could not give forgiveness. I think maybe he had voiced an objection about it.

Q You remember that from the deposition but do you remember that from the meetings themselves?

A No, I remember it from deposition. From something pertaining to this trial. I am not even sure it was deposition. I don't have that recollection from the meeting itself.

Q Do you recall if he said or didn't say that the forgiveness was a fraudulent inducement of any kind?

A No, I am sorry.

MR. GLATZER: No further questions.

THE COURT: Mr. Mandel, you had one or two questions.

MR. MANDEL: Yes, your Honor. I am sorry, I have three or four or maybe more questions, but but it won't be more if I get direct responses.

RECROSS EXAMINATION

BY MR. MANDEL:

Q In making your calculations to the effect that the capital account of Bleich and Donoghue were not what they might seem to be, did you take cognizance of the fact that certain partner were not paying up the full amount of their deficits or any part of their deficits? The answer is yes, right?

MR. SHAW: Wait a minute, let's --

A The answer is no.

Q How did you reach the reduction of the capital accounts of Bleich and Donoghue?

MR. SHAW: As at December 31, 1970?

MR. MANDEL: Yes.

A The December 31, 1970 shows an aggregate loss position 400,095 some odd dollars, and I interpreted that loss position as an encroachment into the limited partners' capital position.

The limited partners' capital position prior to that encroachment was $2,147,000.

Q You are talking about accounting, is that right?

A Yes.

Q If the general partners had made up the deficits, there would be no encroachment of the limited partners; right?

A Yes, but that's what I think Paragraph 9.4 directly runs to in the partnership agreement.

Q All right. Now I read to you from Page 4 of your affidavit --

THE COURT: What is the date, Mr. Mandel?

MR.MANDEL: The date of his affidavit is July 5, 1972, and I am going to the middle of a paragraph, and ask if you didn't take this under oath:

"There was in my mind, and I believe in the mind of all the general partners, including those who had withdrawn prior to the execution of the December 31, 1970 agreement, a certainty that upon liquidation there would be no capital available for distribution to general partners. Indeed, the partnership agreement might require general partners to indemnify limited partners against loss, and the indemnity looked to the assets of the general partners in addition to those already committed to the partnership."

Did you make that statement under oath?

A I did, but the partnership agreement is full of contradictions.

Q So you want it both ways --

THE COURT: Strike out the balance. The answer is you made that statement under oath. All right, next question.

Q On February 11th the corporation assumed all of the indebtedness of the partnership, whatever it might be, to Gross, Bleich and Donoghue; right?

A Yes.

Q And there is no doubt in your mind that on February 12th, the corporation could have paid Gross, Bleich and Donoghue in full whatever their capital amounts might be, right?

A On February 12th?

Q Right.

A Whatever their capital account might be?

Q Right.

A Not on that basis, no, sir.

Q Not on which basis?

A On whatever their capital accounts might be.

Q All right, assume Gross' capital account was 250, and Donoghue's and Bleich were 77 each. Could the corporation have paid in full on February 12th?

MR. GRUTMAN: I object, your Honor.

MR. SHAW: I object, your Honor, unless it is without going out of business or under what circumstances.

THE COURT: Let's see what his answer is.

A It is my recollection of the financial condition of the company that we did not have those amounts of cash on hand at that time. I think it would have probably been necessary to do some borrowing.

Q Do you recall Page 11 of your affidavit, which is already in evidence, which says "Even accepting their claims at face value" -- and "their" means Gross, Bleich and Donoghue, right?

A Right.

Q " -- their claims at face value without any offset, the new corporation from its inception would have been able to pay said amount out and would have been able to continue in business, as with such payment it would still have had adequate capital for business purposes and to satisfy stock exchange requirements."

A That's what I have just testified, Mr. Mandel. We didn't have the cash, but we would have had to go borrow it, we would have pledged assets the firm had, we would have pledged McCarthy stock, for example.

Q And the same was true on the 5th of July, 1972, the courporation could still have paid Gross, Bleich, and Donoghue in full, right?

A Yes, I think our cash position was probably somewhat improved, but the answer is still yes.

Q And the only reason that Gross, Bleich and Donoghue could not collect before then was the assertion of the Buckley counterclaim, is that correct?

A Not in my mind, as I testified. I am not sure they were entitled to any amounts of money. I am not sure they were entitled to anything other than what people in similar positions received.

Q When you say you are not sure, what do you mean by that statement?

MR. GRUTMAN: Now, your Honor --

Q Is that a legal conclusion?

MR. GRUTMAN: I object on the ground that it calls for a legal conclusion, and it's been previously testified to, and it is not the subject of proper recross; and the man promised to ask one or four questions andis now on 25.

THE COURT: Mr. Shaw asked a whole raft of questions in this area as to this man's opinion as to ability to pay; and as of the turn of the tide here, and that's what I think is what flows from that.

Go ahead.

A I believe it equitable to determine what the value of their accounts would have been, given that the alternative that they proposed and that you assert is the better one, I believe it appropriate, proper to determine their capital account under that alternative, and that is liquidation.

Q That is some conclusion of law of yours?

MR. SHAW: Objection, your Honor. He has asked for the basis, and he got the basis.

THE COURT: Sustained. That's a conclusion of his, all right? That's a conclusion, right.

THE WITNESS:Yes, sir.

Q Did this conclusion come from Mr. Persky?

A No, sir.

Q Did you ever discuss it with anybody?

MR. GRUTMAN: I object. This is not proper recross.

THE COURT: Yes, I think we are getting a little far afield, Mr. Mandel.

Q The fact is that by July 5 1972 no claim or offset had been asserted against Gross, Bleich or Donoghue except the Buckley claim.

MR. SHAW: You mean in pleadings?

MR. MANDEL: Yes, in pleadings or in litigation.

THE COURT: That's true. I gather there is no question about that.

MR. MANDEL: All right.

MR. SHAW: There were oral claims but --

THE COURT: The only action filed was the Buckley claim.

MR. SHAW: Correct and it wasn't for a substantial period of time and there were counterclaims asserted.

THE COURT: December of '73 the second round of claims were asserted.

MR. GRUTMAN: Just a moment, your Honor. That followed the summary judgment, your Honor, that is correct.

MR. MANDEL: December of '72.

THE COURT: Thank you very much, Mr. Risher.

MR. GRUTMAN: Your Honor, I have asked permission, because of the witnesses we intended to call who is a lawyer and is starting a trial in Westchester tomorrow, if I could put on one of the lawyers that I intend to call as a witness who is in the courtroom right now.

THE COURT: Mr. Mandel, any diffuclty with that?

MR. MANDEL: No, no objection.

DONALD SNIDER, called as a witness on behalf of Defendant Finley, Kumble, having been first duly sworn, testified as follows:

DIRECT EXAMINATION

BY MR. GRUTMAN:

Q Mr. Snider, are you duly licensed to practice law in the State of New York?

A Yes.

Q When were you admitted to the Bar, Mr. Snider?

A I was admitted to the Bar of the State of New York in mid 1969, I believe February or March of 1969.

Q Would you briefly give his Honor an outline of your past academic and professional education and background.

A Yes.

I attended NYU undergraduate Washington Square College between 1972 and 1965, graduating NYU with honors in philosophy and magna cum laude. I was also awarded a full scholarship at NYU.

Q Were you Phi Beta Kappa?

A And Phi Beta Kappa. I then was accepted at Harvard Law School, again on a full scholarship and attended Harvard Law School from 1965 and graduated there in June of 1968.

While at Harvard Law School I turned down an invitation to be on the Law Review so that could pursue employment in order to afford to continue at Harvard Law School, and during the period of time at Harvard Law School I was working for the firm of Roper & Gray in Boston part-time, to go with assisting various professors at the school in doing research.

Q Who were the professors, please?

A Professors Casner and Leach in particular, and various other professors part-time but both Professors Casner and Leach, in the property and future estate planning fields, rather significant portions of time on a compensated basis.

At the time I completed Harvard Law School I was invited by Professors Casner and Leach to remain although I had been accepted to start at the Finley, Kumble firm following graduation to assist in the revision of their property tex book,which was called Casner and Leach on Property, where I accepted that offer with the concent of Finley, Kumble, and stayed up at Harvard for the next four or five months and significantly revised the property book such that about 50 percent of that textbook is a considerable portion of my own crafting.

I then started effectively with the Finley, Kumble law firm at or about October of 1968.

Q By the way, I am not sure that the record is clear.

When you were graduated from Harvard, what was the order of your graduation?

A I was magna cum laude,and in the top, I believe, 3 or 4 percent of the class.

Q Very well.

Sinc coming to Finley, Kumble in 1968, have you been continually associated with the law firm?

A Yes.

Q Are you presently a member of the law firm?

A Yes, I became a partner of the law firm in 1974, I believe, early, February of '74.

Q In what area of the law firm are you presently a partner?

A In the Litigation Department.

Q In November of 1970, you were an associate in the law firm, is that correct?

A Yes.

Q And in what department did you primarily function?

A That is not a simple question to answer. At the time I joined the law firm, I was devoting for the first six months all of my time to the Litigation Department. I had a considerable real estate background, which I have continued to pursue, both with the American Law Institute restatement of property, and as a lecturer with the Practicing Law Institute, and have attempted to devote a portion of my time to the Real Estate Department.

At the same time I had indicated an interest in pursuing corporate law, and at or about this time, if one is thinking of November of 1970, I believe I was devoting approximately 30 percent of my time also to general corporate matters both of a routine nature of bylaws, minutes, and preparing annual reports, proxy material, registration material, in order to at this point being a year or two out, develop a more particular experience to choose whether I wished to do litigation, corporate or real estate.

Q Mr. Snider, you say that you are connected with the American Law Institute Repayment of Property?

A Yes, sir.

Q What is your connection with the restatement of property?

A The restatement of property, the present reporter is Professor Casner who was formerly Dean of Harvard Law School, and I, along with six other people, am an advisor to that restatement of property, and have been for the last four years. It is a continuing, on-going process where we meet two or three times a year in order to prepare drafts. The drafts with respect to the restatement of property have presently been approved by the Council of the American Law Institute as tentative drafts but not yet published.

Q Do you also from time to time lecture at the Practicing Law Institute?

A Yes, and again with respect to property areas.

Q In 1970 were you aware of any professional question connection which the Finley, Kumble law firm had with the partnership of a brokerage house known as Newburger, Loeb & Co.?

A Other than not wishing to be absolutely precise on dates, some time later in 1970, and it would be certainly prior to the Buckley assignment itself, if we use that as a frame of reference, I was advised by Mr. Persky, although I may have received an intercom telephone call from you, Mr. Grutman, but I believe my first contact was with Mr. Persky who at that time was head of the Corporate Department and also the person in the firm having corporate litigation experience, and was consulted by Mr. Persky with respect to the representation of Newburger, Loeb & Co., a partnership, and in particular, the defense of a churning claim which had been asserted in an arbitration proceeding which Mr. Persky had advised me we were to succeed former counsel in the representation of Newburger, Loeb with respect to this claim.

I had some, only peripheral knowledge, that we had begun some time near or about this time a greater representation of Newburger, Loeb & Co. but that we were not general counsel for that brokerage house.

Q Mr. Snider, did you see the arbitration papers when the file came over to the Finley, Kumble office from predecessor counsel, which was Golenbock & Barell.

MR. MANDEL: I object to leading questions.

MR. GRUTMAN: Is there any doubt about it, your Honor? This is non-jury.

THE COURT: At this point I will overrule the objection.

Q Did you see that file?

A With respect to seeing the file, I know that I saw the answer, set off, and counterclaim that had been interposed by Webster, Sheffield. I would not wish to say I had seen the arbitration file ina sense that it would constitute all the papers in the arbitration proceeding. I am certain I did not. I know that I saw the answer, setoff, and counterclaim posed by Webster, Sheffield on behalf of Mr. Buckley.

Q Mr. Snider, were you considering what legal papers should be further served on behalf of Newburger, Loeb in that arbitration?

A Yes, exactly.

Q What procedural considerations did you give at that time?

A At the time Mr. Persky called me into the office to discuss our becoming successor counsel in an existing arbitration proceeding, if I may backtrack since I see no papers at this point, I went into Mr. Persky's office, and I believe with all due respect Mr. Persky considered myself at this time a kind of scholar and one who was familiar with answering legal questions without in-depth research andwhose opinion on such legal subjects we enjoyed doing a dialogue.

And I think that my first meeting with Mr. Persky was more in terms of a diagalogue between two attorneys, and I do not recall at any time at this meeting seeing any papers, but a factual recitation which he made to me.

And at that time, as I recall what the factual context in which he was inquiring of me both for my judgment and to do some research on, was that Newburger, Loeb & Co, a partnership, had been a clearing broker for

Gross & Co., that Gross & Co. was the originating broker with respect to transactions in this Buckley account.

Now at that time I don't know whether I even knew it was Gross & Company. WE had been talking in terms of an originating broker and a customer and a clearing broker.

Q Yes?

A He had advise me that, as a result of transactions in this account, between the customer and the originatingbroker, there was a significant deficit that had been absorbed by the clearning broker; a number, to my knowledge, in excess of $300,000 but I don't recall the exact number.

It advised that at this point in time, when the clearing broker sought to collect the $300,000, it was faced with defense and counsel claims asserted by the customer which ran primarily against conduct of the originating broker to which the clearing broker cold at most be directively liable for; and what I thought was necessary in order to protect that clearing broker.

At that point, I began considering various possibilities inthe research Recognizing that we were in an arbitration proceeding, I inquired whether or not there was a separate arbitration agreement between that clearing broker and the originating broker, such that this dispute between them, if any, was not arbitrable -- excuse me, this arbitration proceeding in which we were bring substituted was before the American Arbitration Association.

I understood and was led to believe in response to questions from Mr. Persky that disputes between the clearing broker and the originating broker would have been arbitrable before the New York Stock Exchange, and at that point saw an immediate problem of getting that dispute before one forum.

Q Mr. Snider, at the time that you were doing this research did you see the actual --

THE COURT: We are still --

A This is all at a discussion stage.

Q All at discussion?

A There is n research or any agreements at this point, yes, sir or dialogue, where he had advised me when I asked whether or not there is something in the industry called a clearing agreement and would be -- would there be an arbitration provision between the originating and clearing, he responded to me to the best of his knowledge there would be a written agreement between the originating and clearing, and that such a written agreement would provide for arbitration before the New York Stock Exchange, not before the American Arbitration Association.

Q Did you consider impleading?

A Well, in connection with my considerations as to whether or not I could implead on behalf of the partnership, the originating brokerage house, my first problem with such an impleader was the existence of an agreement between the clearing broker and the originating broker that provided for their disputes to be heard before the New York Stock Exchange.

My second problem that I articulated to him is a problem with impleading was American Arbitration Association does not really have such a litigation tool as impleader. There would have to be a consent by parties to go to arbitration.

There is not to my knowledge at that point a mechanism under which you could compel.

Q In the event that impleaders were not available, what other consideration did you have?

A We then discussed how to protect that partnership from both -- if it wished to settle the claim, but we were proceeding along two lines at that point.

At the same time that I was talking with Mr. Persky, he had advised me tha- the collectibility of any claim that had been asserted againstthe customer, was in serious doubt; and that if was settled, the partnership would suffer a significant loss in the deficit account.

So that what came to mind was both the protection of the partnership if it wished to buy peace with the customer, put that dispute aside a second on which to deal with it as an area in which I did research on how if it was to be settled between partnership and the customer what documents would be necessary to protect the partnership.

Continuing along the line of making the partnership whole if it would be found to be derivatively liable since in my mind therewas a problem of getting it before the American Arbitration Association, that I did not feel that arbitration before the New York Stock Exchange was the forum in which to litigate these claims.

Q How about a plenary action for indemnity?

A I considered plenary. There were two forums in which I would consider the possibility after plenary action, state court or federal court. In order to get indemnity.

The state court I rejected on the grounds that the nature of its indemnity claim was one arising out of the 1934 Act and that there was exclusive jurisdiction with the federal court to assert that claim. So to the extent that would pursue a claim for indemnity, it would have to be within a federal forum a plenary action by the partnership against the originating brokerage house.

In order to pursue that, it was here that we had what I consider an academic discussion. There is a serious question, under the Securities Exchange Act, whether a party who is considered liable, either because it is a controlling person of a person who is primarily liable or simply liable under a doctrine of respondeat superior, principal and agent type theories, whether it could institute an action for indemnity or contribution.

I have in mind and we had in mind when we were discussing the clear position and we are dealing in 1970, enunciated by the Securities and Exchange Commission, that between joint underwriters or between any parties towhich the securities act imposed a liability, whether just or unjust, under the common law, it was the position of the Securities and Exchange Commission that that party could not bring an action for indemnity.

Q This is all pre-Globus conversation, correct?

A Yes, it was also pre-looking at a single document. It was this kind exchange that we were having.

Q Considering the existence of these procedural or substantive difficulties or problems which confronted you, did you have some solution in mind as to how to obviate the difficulties you and Mr. Persky were exploring?

MR. MANDEL: I object to that question. Let him tell about his conversation with Persky; not what he had in mind or --.

THE COURT: This question admits of that. Go ahead.

Q Would you respond to my question, Mr. Snider.

A Yes.

Q When you spoke to an academician -- all right, go on.

A All right.

Some time shortly after that meeting with Mr. Persky, and I have not tc the extent it ought to be clear, exhausted that entire meeting. We began pursuing in fact the area of settlement of that claim at the same time that I was pursuing the research in connection with the protection of the partnership in order for it to obtain indemnity. Some time I believe several weeks but certainly not a month was -- it was within a week or two after this first meeting with Mr. Persky, he called me in to again discuss that our substitution was leading to a point where he believed he was able to work out a settlement with this customer on behalf of Newburger, Loeb. We discussed the documents that would be necessary in order to consummate that settlement.

With the same, I think, academic type of dialogue, that we had, I pointed out that there is again an uncertainty whetherone may take a general release of a claim that is arising out of the securities act. There is provision in both the securities act of '33 and in the exchange act that expressly prohibits waiverof any benefits or release of any rights. It was both of our judgment that that provision would not apply to an existing claim, either in an arbitration proceeding, or in a lawsuit, but one in which we could not with certainty say that a mere general release would be sufficient to buy peace for the partnership.

It then occurred, and I think to either both simultaneious or I am not sure who, that in connection with other securities cases that we had worked on together, whenwe had settled them, even in an existing lawsuit forum, that we had taken three documents in connection with each of those settlements, both a covenant not to sue or to sue any further, a general release; and an assignment of any claim of that person who had asserted the claim.

No feelingthat any one of those was going to guarantee the result,but the feeling that in the aggregate if a party possessed a claim arising out of the securities act, though he might be be able to waive it, though he might not be able to release it, to the extent he had assigned it, there was some case law that provided that that was a valid way to eliminate and buy peace.

It occurred then that we could take an assignment from Buckley in order to buy the full peace for the partnership. It again, right I am sure it not more than several seconds after either of us articulated the concept of an assignment as protection of buying safepeace, that that also solved the problems that we were looking to to make the partnership whole in connection with an indemnity action. The indemnity action being rife with problems as to whether or not the parties seeking indemnity possessed a cause of action under the securities act, even though he would have in common law, that a federal court would have permitted it, one may always as assignee, stand in the shoes of the assignor, and factually as I understood the claims at this point, they came out the same; namely, that the assignment of the claim that Buckley had there was a claim of 75,000 -- it was around $75,000 in commissions, that the Webster, Sheffield firm had computed in its allegations as having been paid which, if there were churning, would be a wrongful payment, to which the assignee would be entitled to get back, together with A, I believe, 170 some thousand dollars in actual losses in this account during this period of time causally connected with the churning claim.

Newburger, Loeb, as the partnership, if it did the settlement as I understood it would suffer approximately $250,000 out-of-pocket deficit and that if it took an assignment and prevailed on the assignment, it could sue for approximately $250,000.

It was at that point that we had assumed that the assignment provided that double function.

Q All right, now, having finished the assignment as you and Mr. Persky conceived of it some time in November or so?

A I believe that would be early December.

Q All right.

Now, besides the problems which you have now discussed with us, were you informed, Mr. Snider, of when these transactions in the Buckley accout took place?

A Yes, even prior to seeing any of the documents at this first meeting with Mr. Persky I was advised that they took place somewhere between '61 and '62, and the last transaction would be as long ago as '66, I believe, and we were then meeting in late 1970.

Q Did you consider what impact the doctrine of the statute of limitations would have in any procedural maneuvers that you would make?

A Absolutely.

Q And what did you do?

A In fact that was what he had called me in, I believe, in terms of a research assignment as the very first row. As I understood it, the statute of limitations is not really a defense that an arbitrator need listen to. It is within his discretion to apply it or not but that Newburger, Loeb, in connection with defending against a counterclaim for churning, could not ascertain within the arbitration proceeding such a defense if it existed.

And that we didn'thave the mechanism within the arbitration proceeding to compel Gross & Company as the originating broker, to similarly appear in arbitration and waive its possible statute of limitations defense.

I was asked to research and consider what the applicable statute of limitations would be in connection with a churning claim that had arisen or purportedly existed for a period from 1962 to 1966, with a recognition that we were now at the end of 1970.

Shall I proceed or --

Q So --

A I then commenced my research, A, with an understanding at that point that the claim for churning, prior to doing any research, was one that the Securities Act and Securities Exchange Act had not provided an express statute of limitations except with respect to actions under 15-C of the Exchange Act, for which there was a three-year statute of limitations; but in my reading of it believed that one could get around that arguably on the basis that one was not seeking to declare a contract void equitably but seeking damages.

But the general churning other than [illegible] an under 15-C, there was no statute of limitations in the federal statutes, and that one would have to look to state law to apply and find what the relevant statute of limitations was.

Q Having looked at state law?

A Having looked at state law and applying state cases, finding that an action sounding in churning, a broker breaching either his fiduciary duty to a customer in his excessive and unwarranted trading, you need a lable to look and find what statute of limitations, it was my judgment that the label that a New York court would apply to it wouldbe constructive fraud, not actual but constructive, then I discovered what I found again very interesting in my research was that the CPLR, which had gone into existence in September of 1965, had one period of ten years for those acts sounding in constructive fraud, that arose prior to the applicability of the CPLR, namely for any cause of action that arose or could have arisen prior to September 1, 1963 there would be a ten-year statute of limitations.

Then with respect to, because that related in constructive fraud there was just an equitable statute. Following the adoption of the CPLR for the period subsequent to 1963, there was a provision that stated it would only be six years for constructive fraud, and it occurred to me that we faced a distinct anomaly in time rapidly moving against us, that if a Court were to find -- let me backtrack one second so when a cause of action arises for churning to to me a rather significant question and one that my research resolved on the ground that a court would properly rule that a cause of action for churning did not arise with respect to each transaction in that account giving rise, for example, as I understood there were more than a thousand transactions during this four-year period to a thousand causes of action, some of which may ahve expired; but that it would have to look at the aggregate of the transactions in the account, and that the cause of action shouldn't properly arise until the trading itself had become excessive or unwarranted or ended.

Q Mr. Snider, however intellectually stimulating this question was, are you telling us that the question was not entirely free from doubt?

A Yes.

Q Very well.

Was there any other consideration which you gave in the time period that you are talking about concerning any other problem that might relate to the protection to be afforded to the partnership by reason of the relationship of the partnership as the clearing house as against the Gross & Company originating brokerage house on the concept of joint tort feasor?

A I am not sure it's any other. It seems to be the same problem of whether the partnership was a joint tort feasor. That question, in my research, led me to believe that if it were a joint tort feasor under common law, it was clear that it was at most what the common law had distinguished between active and passive joint tort feasors; that as I understood and Mr. Persky was the one who simply educated me as to what the function of a clearing broker as compared to an originating broker was, and assuming that input to be accurate, because I had no knowledge of it, I reached the firm conclusion in my mind that, applying common law principles, that the clearing house was at most passively liable for the active conduct of its originating broker, and that under common law principles it had a clear right to indemnity.

Going the other way, however, since our cause of action was really one sounding in the securities law, one that the federal court had exclusively jurisdiction to enforce rights under the Exchange Act of '34, I was then faced with the problem that argument, A, this arbitration proceeding asserted the claim solely against Newburger, Loeb, not the originating broker, and presumably was based upon Section 20 of the Exchange Act, that had provided that in addition to any other duties that people would -- and rights you might have against persons, a person deemed a controlling person as defined in Section 20, wouldbe jointly liable with the actual wrongdoer.

Q All right. So after considering both the common law aspect of joint tort feasor in conjunction with the impact of Section 20 of the Exchange Act had, you came to the assignment recommendation which you passed on to Mr. Persky, is that correct?

A Yes.

Q Mr. Snider, thereafter did you participate in any negotiations directly or indirectly with any of the partners or associates of the Webster, Shieffield law firm?

A No.

Q Did you ever have any discussions with Mr. Ryan, Mr. Holtzschue or Mr. Leland Cook?

A Absolutely not.

Q At some time after December 17th or after December 30th, were you advised of the fact that Mr. Persky on behalf of the firm's client had been successful in negotiating a settlement of the Buckley claim for $50,000 plus an assignment in favor of Newburger, Leb of whatever claims Buckley had against Newburger, Loeb?

A Yes, but I am not certain of the date I was advised of that. I believe I was advised in connection with whether or not I had to prepare for the arbitration proceeding formal substitutions and prepare for such a hearing some time in December, that that need not be done, that a settlement was going to be effected.

Q Do you remember being advised by the head of the Litigation Department that the arbitration had been scrubbed?

A Yes.

Q And the head of the Litigation Department then was who?

A Herbert R. Roth.

Q At some time thereafter was there a change in who was the head of the Litigation Department?

A Yes, there was, and that's you, but Mr. Grutman, I am not certain I heard that from Mr. Roth and not Mr. Persky.

Q All right.

A But I did hear that it had been handled.

Q Very well.

A And settled.

Q By the way, after it had been settled, did you have any connection in either your capacity as an associate in the Litigation Department or with multifaceted responsibilities extending into the corporate area, of any activity undertaken by the firm in connection with the proposed reorganization of Newburger, Loeb?

A It may seem strange but I had absolutely no knowledge at the time I was doing any of these matters that the partnership which we represented was transferring assets to another company.

Q All right.

A As far as I knew we represented the partnership and though I knew that there were meetings going late into the night with respect to problems that the partnership had, I had no personal knowledge of them at all.

Q All right.

At some time in either late January or early February, were you requested by any of the partners of Finley, Kumble to draw a complaint?

A Yes, I was.

Q Who was it who asked you to draw a complaint?

A Again I am not certain that it was Mr. Persky or Mr. Roth. I am certain that it was one of them. Now, whether -- and we -- the reason I say I am not certain is we had a very firm rule that no assignment could be made except by the litigation partner but I believe that Mr. Persky and I made various exceptions, but I was clearly instructed to prepare a complaint on behalf of the partnership.

Q Mr. Snider, do you remember being assigned to draw that complaint by me?

A It may well have been even you at that point. I am not certain as I tried articulating now who the person who assigned it was.

Q If it was me, was this the first securities case that you and I had worked in or not?

MR. MANDEL: I object to that.

A No, it was not.

MR. MANDEL: Building on a non-answer.

He says if it was me.

THE COURT: Yes, sustained.

Q If I tell you that it was me, would that refresh --

MR. MANDEL: I object to that.

THE COURT: He doesn't remember. He said several times, Mr. Grutman, he doesn't remember.

MR. GRUTMAN: All right, very well.

MR. SHAW: Can't we take Mr. Grutman out?

MR. GRUTMAN: Mr. Grutman will represent that as head of the Litigation Department.

THE COURT: Well, Mr. Mandel objects to it.

MR. GRUTMAN: Mr. Mandel, you object to my representation that I am the one?

THE WITNESS: I want the record to be clear that if he does suggest that, I have no recollection that he wasn't either.

THE COURT: Mr. Mandel?

MR. GRUTMAN: I would like to ask Mr. Mandel, you mean to say that if I represent that I am the one who assigned him to draw the complaint, you won't accept that representation?

MR. MANDEL: That's just what I said.

MR. GRUTMAN: Fine, Mr. Mandel.

THE COURT: Let's go forward.

Q Whoever it was, and we'll prove it another way, you did draw a complaint, is that correct?

A Yes, I did.

Q When you were drawing the complaint, were you advised that the Buckley case had been settled?

A Oh, yes.

Q And did you get any papers from Webster, Sheffield?

A Yes, I don't think that the causal connection again is clear that I believe I saw the papers by Webster, Sheffield, namely that answer, set-off and counterclaim.

Q Fine.

A Some time in December prior to the actual settlement of the claim, I saw the arbitration answer.

Q What kind of a complaint were you instructed by whoever it was that instructed you to draw?

A One that placed Newburger, Loeb & Co. as assignee of those claims that were assigned.

In other words, one that, if I can be a little broader, I was advised by Mr. Persky that there would be a potential of numerous claims existing in that partnership against Mr. Cross; that I need not concern myself with any of those potential claims, nor with the possibility that under the federal law that the failure to plead other claims that Newburger, Loeb & Co. might have against Mr. Gross would constitute a waiver because we were suing solely as as assignee.

Q When Mr. Persky spoke to you about drafting the kind of complaint that whoever it was instructed you to draw it told you to draw, had you heard that you were representing a client other than Newburger, Loeb & Co.?

A No.

Q I show you a document which is marked in evidence in this case as Defendant Gross Exhibit X. Will you look at the document, Mr. Snider, and do you recognize that to be the complaint which you drew?

A Yes.

Q When you drew that complaint, to what extent if at all did you rely upon the factual allegations made by Webster, Sheffield on behalf of Gross in the arbitration?

THE COURT: In Mr. Mandel's objection to leading becomes of some strong validity. Why don't you ask him where he got his facts and what he did.

Q Will you answer his Honor's question, Mr. Snider.

A Yes. With respect to any of the factual allegations in the complaint as to the handling of the Buckley account, and I don't have that in front of me, but I am certain to the extent I can have a recollection of how long it took me to prepare this complaint, that all of the factual allegations as to the number of transactions, the average investment in the Buckley account, the total number of purchases and sales and such factual data I hadbeen advised and again whether it's from you, Mr. Roth, or Mr. Persky, in whoever I was discussing this matter with, and whoever it was that assigned it to me, had advised that in their discussions with Webster, Sheffield, it had retained an expert to review the act, that those allegations which had been pleaded we, for purposes of a statute of limitations problem, were not going to at that stage retain any expert to similarly renew that investigation.

Assume the factual allegations to be accurate, did the assignee have a cause of action.

And it -- my research first in the drafting led me to the --

THE COURT: Mr. Snider, you still haven't answered. Where did you get it. Was it from a sheet of paper or from a memorandum?

A I am sorry if I wasn't clear. The actual answer, set off, and counterclaim which is why I asked, I haven't seen it, presented here, but I know I saw an actual answer, set off, and counterclaim that contained rather detailed information as to an average investment, a turnover ratio, though -- because I have no recollection of making these computations myself but I know --

THE COURT: That is where you got the information that went into this exhibit X?

THE WITNESS: Yes.

THE COURT: And from no other?

THE WITNESS: From no other source that I am aware of unless someone refreshes it, but I know that I looked at an arbitration claim, and my recollection is that that arbitration claim contained all of the detailed factual data that I needed.

Q You said in answering the question for his Honor that you were advised that there were certain statistics as turnover ratio and certain figures as to the numbers of transactions, and you mentioned that you had been informed that Webster, Sheffield had retained an expert to go through the underlying documents and --

A Make those computations.

MR. MANDEL: I object to this. It is repetitious and leading.

THE COURT: Yes.

MR. GRUTMAN: I am coming to the question.

Q Where did you get that information from?

A I believe what I said was I derived that information from whoever it was that assigned it to me to prepare the complaint.

Q Did you thereafter upon receiving the assignment, call up anybody at Webster, Sheffield or speak to Mr. Buckley himself to verify whatever it was that had been asserted in the pleadings interposed on Buckley's behalf by Webster, Sheffield in the arbitration?

A No, I did not.

Q When you were asked to draw this complaint, were you given any deadlines within which to get it up?

A I don't believe that I was given any fixed deadline except the appreciation that I have just discussed that the statute of limitations, if my research was wrong, as to when it arose, was tolling every single day with respect to transactions and that there was a distinct time pressure with the prepartion of it but I don't believe I had any fixed deadline.

Q Now, Mr. Snider, I invite your attention to the style of the caption. The caption reads "Newburger, Loeb & Co., a New York Limited Partnership as Assignee of David Buckley and Mary Buckley".

A Yes.

Q By the way, this is dated February of 1971, plaintiff against Charles Gross and Gross & Company, defendants.

A Yes.

Q I ask you, before you drafted this complaint, Defendants' Exhibit X, had you seen the settlement papers or the releases which had been executed on or about December 17th or December30th?

A Yes, I believe I saw a closing statement prepared by Lenore Kalmus of our firm containing an actual general release and an assignment from the Buckleys.

Q To whom?

A To Newburger, Loeb & Co. which at this point in time was the only client I was aware of that we represented, namely, the partnership. It was an assignment from the Buckleys to the partnership.

So the documents that you saw in addition to what you had been told, all thatyou knew about was the partnership, correct?

A Yes.

Q And that is who you drafted as the plaintiff?

A Yes.

Q Now, the defendants in the complaint which you drafted, were Gross & Company, and Charles Gross, is that correct?

A Yes, sir.

Q Will you tell us where you got the information as to who you should designate as the party defendant in the complaint that you were told to draft?

A All right.

Again, whoever it is that assigned this matter to me, although I believe it would be Mr. Persky and when we first discussed this matter as to who the originating brokerage house was, that within one of the problems that we had discussed was that this originating brokerage house called Gross & Company, was not presently in operation, nor did it possess any significant assets, if any.

And that as far as he knew, and as far as I was led to believe in whatever discussions I may have had either with you or Mr. Roth, it is clear in my mind that I knew of no other partner of Gross & Company than Charles Gross, and that in order to collect any judgment under New York law, as I understand it, if one sues a partnership, and only sues in the partnership name, and collects a judgment, one may only levy upon partnership assets which my premise was is zero.

In order to obtain a collectible judgment, one would have to sue in name and serve at least some general partner of that partnership, and then one might levy and collect from that partner.

To the best of my knowledge, and it is my recollection, I didn't know of any other partner than Charles Gross. Now where I learned that, I believe it was through my first conversation with Mr. Persky in the description of what the nature of this company was. I believe I also learned at that time that Newburger, Loeb & Company had either acquired Gross & Co. or all of its assets but it was just that I knew it wasn't in existence today.

Q And that explains how it came about that you identified as the party defendants the persons who were named in the draft complaint which you drew and which was Defendants' Exhibit X, is that correct?

A Yes, except I believe in addition to that I would have asked when I read the Webster,Sheffield arbitration, who was the registered representative to which that had reference and was told I assume it to be Mr. Gross, he is the only.

Q All right.

Who told you?

THE COURT: Strike that out.

A That's what I --

MR. MANDEL: I missed that entirely. May I have that read back?

Q Just slowly, Mr. Snider --

THE COURT: Mr. Grutman, you are standing between counsel and the witness. He has asked that you not stand there, and with that position I cannot argue, and really I can't argue there either. Even if he has suffered you to be there --

MR. GRUTMAN: I think it is a subterfuge.

THE COURT: I don't take any position except to say that if he'd like me to see the witness while he is testifying, he has a rightto do so.

MR.MANDEL: Mr. Reporter, may I have the last answer back, please?

(Read.)

MR. MANDEL: I object to that.

THE COURT: You were told.

A "I assume it to be."

THE COURT: Somebody said, "I assume it to be Gross"?

THE WITNESS: Correct.

Q Who was it who told you he assumes it to be Gross?

A Again I am almost certain this occurred during my first conversation with Mr. Persky or my first few conversations with Mr. Persky, so I am almost certain it was Mr. Persky, but I wouldn't be surprised it ihad been either Mr. Roth or you, if that's who I was dealing with at the time; but I do not have any distinct recollection of such conversations with Mr. Roth or you.

THE COURT: So your best recollection?

THE WITNESS: My best recollection is that it was Mr. Persky.

Q Now, I ask you this question, Mr. Snider, when you were preparing the complaint, some time in January or early February, was there any memorandum in the Finley, Kumble file purporting to be a resume of a meeting by Arthur Silverman with a man named Jordon?

A No. I have never heard of that name until certainly several months after the service of this complaint.

Q Up until that time, had you ever seen any piece of paper in a Finley, Kumble file that had his name on it?

A No, I did not.

Q Had anybody in our office ever told you his name?

A No.

Q Had you ever heard it from Mr. Persky?

THE COURT: Yes or no.

A No.

Q Had you heard it from Mr. Roth?

A No.

Q Had you heard it from me?

A No.

Q Or from Mr. Gelb?

A No, nobody.

Q Or from anybody else in Finley, Kumble?

A Nobody.

Q When you went over the file to draw the complaint, Mr. Snider, didyou look through the complete file that we had?

A I am sure I did.

Q At the time that you drew the complaint, had you any awarenessof the existence of a lawyer named Philip Mandel?

A No.

Q Or of any position asserted by Mr. Mandel on behalf of the people whom he purported to represent?

A No, I did not.

Q Did you know of the existence of Arthur C. Silverman on behalf of the people whom he purported to represent?

A No. The best of my knowledge Mr. Silverman was former counsel for the partnership and that was all I knew about Mr. Silverman.

Q Did you know anything about what activities these people that I have just mentioned to you were engaged in in relationship to our firm and the reorganization of Newburger, Loeb & Company, Inc.?

A No.

Q When you were instructed to draw this complaint, other than to draw the complaint were you given any other instructions?

A With respect to the Buckley matter?

Q Yes.

A No, nothing.

Q Were you told the use to which the complaint would be put?

A No. Wait, I assumed it was in fact for an actual complaint. It was not -- I was not instructed just prepare a rough draft after complaint. I was instructed to prepare a complaint to be asserted on behalf of the partnership who was an assignee.

THE COURT: In other words, this was in final form?

THE WITNESS: In final form as best I could at that point.

Q As best you knew?

A Yes, and then submitted to the litigation partner for signature.

MR. GRUTMAN: I do believe, your Honor, there is a copy of the complaint in this action which is an exhibit. It may be triple L. I am not sure.

MR. ESTERMAN: You mean in the arbitration?

MR. GRUTMAN: No, I mean in this case.

THE WITNESS: I think he means the actual pleading as filed.

THE COURT: This one?

THE WITNESS: This is the draft complaint.

MR. GRUTMAN: Your Honor, I ask the Court to take judicial notice of the actual pleading in this case.

THE COURT: Absolutely.

THE WITNESS: I have a copy too.

MR. GRUTMAN: Your Honor, I have a copy of the complaint.

THE COURT: All right.

MR. GRUTMAN: Your Honor, here is a copy of the complaint.

(Document handed to the Court.)

THE COURT: Mr. Snider, you said to me --

THE WITNESS: This is the copy he had given me. I believe it is marked X, which is the draft that I had done which would have been filed to the best of my knowledge, but it was a -- it is my first finished draft. It is probably my sixth draft.

THE COURT: Did I understand you correctly to say that you prepared Exhibit Xwith the idea that this was a fileable instrument?

THE WITNESS: Yes.

THE COURT: All right.

THE WITNESS: And at the time I prepared it I believed it to be accurate.

THE COURT: Very good.

Q Did you subsequently learn that Exhibit X as you had drafted it was not served?

A Yes.

Q And were you requested to prepare another complaint?

A I was requested some time after February 12th to revise the complaint to reflect two facts.

One was that the plaintiff would no longer be Newburger, Loeb & Co., partnership, as assignee,but that on February 11th, the partnership had further assigned the Buckley claim to Newburger, Loeb & Co., Inc., a New York corporation.

Therefore, Newburger, Loeb & Co. was no longer a necessary party plaintiff. It was simply an assignee and that the proper plaintiff was now to be the party that had become the assignee subsequent to February 11th.

The only other change that I have any recollection of making between Exhibit X and the actual complaint as sent to the marshal for service was the additiona of Miss Bleich.

Q Mabel Bleich?

A Mabel Bleich, as an additional partner of Gross & Company; namely, that there was now to the extent we could recover judgment, against Gross & Company, a second person who was to my knowledge and I believe I learned that, whoever instructed me to file the final complaint, and again I believe it to be Mr. Persky, to make the two revisions, and he had given me an address at that time.

Q Other than changing the caption to make the plaintiff Newburger, Loeb & Company, Inc. rather than Newburger, Loeb & Company and adding Mabel Bleich as an additional party defendant, were there any other changes in the parties between Exhibit X and the copy of the complaint which was actually served and did commence this lawsuit?

A No. To the extent I reviewed the two copies last night for the first time, I know of no change in any body of the complaint with the addition of two paragraphs that required addition by changing parties.

Q In the complaint which was actually served, Paragraph 12 of the complaint, as actually served which reads as follows "During that 4-1/2 year period defendant Charles Gross was the partner and registered representative of defendant Gross & Company with which the Buckleys dealt." That is the same paragraph and under the same number as it appears in Defendants' Exhibit X, is that correct?

A It would be under a different number thought but it would be the same.

Q It is Paragraph 11 in Defendants' Exhibit X and Paragraph 12 in the complaint as accually served, is that correct?

A Yes, it is identical with the exception of renumbering.

Q And as of the time?

A Excuse me, Mr. Grutman, it is Paragraph 10 in the prior because it took two additional paragraphs to add two different parties.

Q As of the time that the complaint which was filed in this action was prepared, you had not yet heard of Mr. Jordon, correct?

A No.

Q And to the best of your knowledge, and other information that had been supplied to you, who were you told was the actual registered representative who had dealt with the Buckleys?

MR. MANDEL: I object.

THE COURT: Yes, sustained.

Q Had you had any information other than what is contained in the complaint?

MR. MANDEL: I object to that.

THE COURT: No other than what he says earlier that he was told.

MR. GRUTMAN:Yes, correct.

Q Other than what you were earlier told, namely that it was Mr. Gross?

THE COURT: No, no.

Q All right. Other than what you were earlier told, had you been given any other information as to who it was who was the registered representative who actually dealt with the Buckleys?

A No, other than what I was told, it is the sole basis of my information.

Q That was continued in the complaint that was served in addition to what you called your first final finished draft?

A Oh, yes, that remained throughout to my knowledge. It came as a surprise after.

Q Mr. Snider, if you had found out that it was not Charles Gross who was in fact the registered representative but some other person or some other partner, in your opinion would that have been of any legal significance?

MR. MANDEL: I object.

THE COURT: Yes, sustained.

Q If you had been informed that the registered representative who actually served as the Buckleys' account was a man named Jordon,would you have named him as a party defendant?

A Yes.

Q Would you have identified him as such in the complaint which you drew?

A Absolutely;I would like to have discovery of a name party not just an employee or somebody who is no longer an employee so that I would have named him as a party and had made Mr. Gross and Mr. Bleich derivatively -- Mrs. Bleich derivatively liable.

Q And Mr. Snider, if you had known about

Mr. Jordon and known that he was the registered representative and was in addition a partner of Gross & Company at the time, what effect would that have been on broadening the base of liability or collectibility?

A It would have an effect on collectibility assuming that such a partner had any assets, yes, I would want to name and serve as many partners as I knew.

Q Other than the statement -- do you now know that the actual registered representative who serviced the account was a man named Jordon?

MR. MANDEL: I object to that.

A I have no personal knowledge of that. I have been told that.

THE COURT: What difference does it make what he knows.

MR. GRUTMAN: Your Honor, I intend to trace how it came about that these innocent errors in the complaint came about.

THE COURT: He is telling us about how that came to pass.

MR. GRUTMAN: And I am going to trace it. Fine. All right.

Q At some time after this complaint was served, Mr. Snider, and as the litigation proceeded, were you replaced by a more senior lawyer in the litigation department to handle the interests of our client in the ensuing litigation?

A Yes.

Q Who was the next lawyer that replaced you in representing our client Newburger, Loeb & Company, Inc.?

A My recollection is that I was supplanted by Mr. Gelb, and I believe that to be the case although I know Mr. Roth also took over and I am not certain of the time period. In fact my conduct with respect to this ended at the drafting and I was doing corporate work at that point.

Q Except for the changes in the assignment from the partnership to the corporation, and the addition of Mabel Bleich as an additional party defendant, is Defendants' Exhibit X and the complaint which was actually served in this case identical as to the substantive allegations and the causes of action pleaded.

THE COURT: They speak for themselves.

A As to the comparison I made last night, I believe with the addition of two new numbered paragraphs they are in haec verba.

Q Did you make a mistake, Mr. Snider, in the "wherefore" clause of the complaint which was actually served and which began this lawsuit?

A Yes, I noticed last night, and I don't know whether anyone else did, that in the actual "wherefore" clause, I still have Newburger, Loeb & Company without my secretary having typed in Inc. in the "wherefore" clause of the complaint.

Q So that the error of omitting to add the Inc. to the name of our client was carried over into the actual complaint that was served, is that correct?

A Well, no, there isn't an error in the prior draft. Newburger, Loeb & Co. was the proper complaint, this one did not contain --

Q The answer is, Mr. Snider, that where you should have put Inc., not your secretary, you didn't do it, right?

A Correct, I didn't.

Q And that was a mistake, did you believe, that could be corrected in the course of the litigation?

A To the extent I knew about it, yes.

THE COURT: He didn't find it out until last night.

MR. GRUTMAN: He was out of the picture and there were other lawyers handling it.

A I never discovered it till last night.

Q Were you familiar with Mr. Snider at the time you made the discovery?

A With the rules that would permit?

Q Yes, with the rules that would permit the correction of errors in the proceeding.

A Yes.

MR. GRUTMAN: I have no further questions.

THE COURT: We are going to recess for the night. What are we going to do about this gentleman's cross examination?

MR. GRUTMAN: I had put him on, your Honor, because I had wanted him to be free to go up to Webster.

THE COURT: Off the record.

(Discussion off the record.)

MR.MANDEL: Your Honor, I am going to make a motion to the effect that if this case is ready to be finished and Mr.Snider is not brought back, all of his -- the case will not be --

THE COURT: Wait till that point, Mr. Mandel.

MR. GRUTMAN: I am sure that we will be more than the time that he will be up in Westchester. He will be back, his testimony won't be struck, and Mr. Mandel will have an opportunity to cross examine him.

THE COURT: Mr. Snider, who are you before?

THE WITNESS: The name of the Judge I am not

DONALD SNIDER, having been previously sworn, testified as follows:

CROSS EXAMINATION

BY MR. MANDEL:

Q Mr. Snider, who actually gave you the Buckley file? Who handed it to you?

A I believe it was either Mr. Grutman, Mr. Roth, or Mr. Persky. I am not certain of whom.

Q About what date was it handed to you?

A We are now asking as to the file and not the first discuss I may have had with respect to --

Q That is right.

A Some time either late November, early December, to the best of my recollection.

Q I take it you have no way of knowing how many hands that file passed through from the time Mr. Silverman handed it to somebody until the time somebody handed it to you?

A That's accurate. I have no knowledge of Mr. Silverman handing it to anybody but yes, I have no knowledge of that.

Q Are you definite that the first time you looked through the file there was no memorandum about Jordon in it?

A Absolutely, sir.

Q Was there anything in the file about Richard Miles?

A The name does not ring any bell with me. I still don't know who he is.

Q Was there any correspondence in the file when you received it?

A Correspondence with the American Arbitration Association in connection with designation of arbitrators; I believe a transmittal letter from the Golenbock firm not directly to our firm,, but I believe it was to somebody at Newburger, Loeb.

Q Named Berkowitz?

A Yes, I think so. I think so. I know Mr. Berkowitz was counsel at that time but I am not certain it was a letter to Mr. Berkowitz but it was to somebody at Newburger, Loeb.

Q Was there correspondence in the file between Silverman and Webster, Sheffield having to do with the proposed settlement?

A No, none that I can recall directly between counsel, no.

Q In the file, did you have, as you recall it, information about David Buckley's resources, a balance sheet?

A I don't believe so.

Q I show you Plaintiffs' Exhibit 32 in evidence, Plaintiffs' Exhibit 33 in evidence, and --

MR. GRUTMAN: I would appreciate it, Mr. Mandel, if you would show him the original documents instead of something you represent is a copy.

MR. SHAW: They are all over here, Mr. Mandel.

MR. GRUTMAN: Thank you.

THE COURT: Is there any question about this?

MR. GRUTMAN: Yes, I would prefer that the document itself be read so that we be sure that we have the one that's in evidenceon this record.

MR.MANDEL: I don't mind that, your Honor. Itwill just take a little time.

Q I show you Plaintiffs' 35.

MR. MANDEL: This is apparently only marked for identification, your Honor. I don't know if that's a mistake.

MR. SHAW: May I see it?

THE COURT: What does the record show?

MR. SHAW: I think this was offered and it was objected to. I think Mr. Mandel objected to it.

MR.MANDEL: All right, I am going to put it in now if the evidence turns to it.

Q I show you Plaintiffs' Exhibit 35 for identification and ask you if you ever saw that paper before.

A Not to my knowledge but -- it would appear to me to be Mr. Persky's handwriting, but I am not even certain of that, but I don't recall see it.

Q I show you Plaintiffs' Exhibit 22 in evidence, and ask you whether you saw that before.

A I may have or may not. I can't respond with any degree of certainty.

Q I show you Plaintiffs' Exhibit 34 in evidence and ask you if you ever saw that before.

A I believe I saw the letter without an attachment, much in the position this is. I have a recollection of not having seen the financial statement referred to in the letter.

Q But you saw 34 in evidence, is that correct?

A I believe so.

Q And when you read 34 in evidence, you became aware, did you not, that despite their claims, the Buckleys had been offering to pay; is that correct?

A Yes.

Q And you were aware, were you not, that the Buckleys claimed they could not pay more because of their financial condition; is that correct?

A I was aware that such a claim had been made, yes.

Q I show you Plaintiffs' Exhibit 7 in evidence. Have you seen that before?

A Yes, I have.

Q You read that when you read the Buckley file?

A Yes.

Q In 1970, right?

A In December or late November, yes.

Q And Plaintiffs' Exhibit 7 made you aware that Leo Stern, on behalf of Newburger, Loeb & Company, had written to Mr. Buckley saying that Buckley's account was an account of Newburger, Loeb like all of their other accounts, is that right?

MR. GRUTMAN: Objection.

MR. SHAW: Objection. The document speaks for itself. It is in evidence and we have had this so many times before.

THE COURT: What are you going to ask him based on that letter? I sustain that objection. Looking at the letter, then what?

Q Did you become aware of the facts set forth in Plaintiffs' Exhibit 7 when you read the letter?

A When I read the letter I became aware of its contents.

Q All right.

Q Plaintiff's Exhibit 25 is the demand for arbitration in the Buckley matter. Did you read that when you read the file?

A Yes, I did.

Q And when you read Plaintiffs' Exhibit 25, you became aware that the plaintiff in the arbitration was Newburger, Loeb and not the Buckleys; is that correct?

A Yes.

Q I show you Plaintifs' Exhibit 28, which is the answer, setoff, and counterclaim. Did you read that in November?

A Or early December, but yes, this was in the file when you received it.

Q And you studied it carefully, is that correct?

A Yes, sir.

Q And were these documents the basis of your discussions with Mr. Persky?

A I believe I told you the basis of my discussions with Mr. Persky and others in the first instance were without documents.

Q How about in the second instance?

A There were several discussions and I don't know --

THE COURT: Can I have the answer set off, if you are not using it at this moment?

MR. GRUTMAN: Exhibit 28.

MR. MANDEL: I will hand that up. We have another copy.

(Documents handed to the Court.)

MR. MANDEL: We have another copy, your Honor.

THE COURT: Do you have a question about the second meeting, whether he had documents at the second meeting?

MR. MANDEL: Yes.

A And I believe I answered you, Mr. Mandel, with respect to whether it was the first, second or third meeting with Mr. Persky, there came a time that I had documents, but they weren't the basis of those discussions that preceded the documents. Your question asked me were the documents the basis or my discussions, and I have a problem with that.

Q Did you have discussions with Mr. Persky after you read the file?

A Yes, I did.

Q And what was the substance of the first of those discussions and when was it held?

A I can't fix a precise date. I assume it to be early December or late November, and to the best of my recollection, it was for the purpose of having now reviewed the nature of the claims that had been asserted in the counterclaims and setoff, what we would do to protect the interest of Newburger, Loeb, and to research whether or not, A, a churning claim had been set forth, and the next question was with respect to that form letter that you just showed me from Leo Stern, whether or not that constituted a statement that would be binding upon Newburger, Loeb that it was its account rather than simply a clearing account. Those were the two areas in which we had discussed. It was that particular letter that came to our attention as to its effect if any that caused us some concern.

Q Didn't you reach the conclusion with Mr. Persky that even without that letter the clearing brokerage house has responsibility to the customer for compliance with the securities laws?

A Your question as phrased cannot be answered with a yes or no. I reached a conclusion that the area of law was uncertain as to the extent of that responsibility, and more importantly, to the extent there was responsibility in the clearing procedure, it was a derivative, the secondary responsibility, and our major concern was why if there was responsibility, how to protect under the circumstances the seemingly innocent party.

Q Did you do any research to reach the conclusion that the clearing house does not have a direct responsibility?

A My research led me to believe that the responsibility outside of arbitration, which an arbitrator can fix responsibility for any or no reason as far as I was concerned in law, but under the Securities Act the only responsibility that I could clearly attribute to the clearing broker would be as a controlling person under Section 20, if it were deemed a controlling person, and if the evidence that I understood and the facts as to the relationship between the originating brokerage house and the clearing brokerage house was not one that led to the conclusion that it was a controlling person.

I then assumed that even if it were a controlling person under the preliminiary sentences of a definition of a controlling person, Section 20 contains a statement that it is a completely defense if that controlling person acted in good faith and didn't cause, participate, or induce the wrongful acts, and believed that under the facts as I understood them, that Newburger, Loeb similarly, even if held to be a controlling person under Section 20, had a defense subject to what the proof would show.

Q Having reached that conclusion that Newburger, Loeb was responsible only in a derivative way as a controlling person, did you also reach the conclusion that Newburger, Loeb would have no action for indemnity against Gross & Co.?

MR. SHAW: Objection, your Honor.

THE COURT:No, overruled.

A The same problem I have as to when you asked do I reach a conclusion --

Q I said did you at that time?

A What I am trying to explain to you is that none of my conclusions were with any degree of certainty but that the conclusion that I did reach with respect to the question of whether or not Newburger, Loeb could obtain indemnity was as follows:

It could have, I was certain, obtained indemnity if it were before the American Arbitration Association in that claim not applying federal law but applying equity or justice. I saw no way to get Newburger, Loeb's claim for indemnity before the American Arbitration Association, since there was no way to do that without the consent of the party that I wished to bring it.

With respect to a claim in state court, I couldn't do it, and it would be remitted to a federal forum. My research with respect to whether or not a party who was held liable under Section 20 or any other securities liability could obtain indemnity, was one that was uncertain in my mind and in fact is still partially uncertain today.

Q I think you testified about the common law of joint tort feasors, and I think you said or perhaps you will agree with me that at the common law, joint tort feasors had no right of contribution against each other; is that correct?

A There were exceptions to the common law but generally the common law did not permit contribution or indemnity among joint tort feasors.

Q But a person responsible derivatively, by respondeat superior or any other way had a right of indemnity against the complyee or agent who caused him to be liable in tort; is that right?

A Generally, yes, also.

Q But no kind of joint tort feasor or person responsible under the common law had the right to take an assignment of the claim from the victim of the tort to be used against his fellow tort feasors, is that correct?

A No, that's not correct but -- I am not even sure I understand the question but to the extent that I do understand it, I don't understand that to be the law.

Q You believe that under the common law and under the applicable federal law, that a person who might not have a right of indemnity would have a right to take an assignment?

A I know of no prohibition against obtaining an assignment as a chosen action which is a contractual right which I know of no public policy articulated other than champerty, which I don't think is in any way involved, prohibiting an assignment, and once the person has the assignment, he stands in a very different posture than one seeking indemnity. That assignment could run to John Doe, Inc.

Q You never heard of any doctrine, to this day, you are telling me, that a joint tort feasor may not take an assignment of the claim? Is that your testimony?

A Two things, Mr. Mandel. The question as to whether or not someone is a joint tort feasor is in itself an area that is subject to numerous exceptions as to whether the simple phrase in the designation "X is a joint tort feasor" answers the inquiry. That is a conclusion.

But to the extent, that is, there are some cases that have prohibited it, and there are similar cases that I found that siad no, no prohibition of anything, that is a chosen action that can be assigned to anyone, and there is no disability in anyone receiving that assignment and acting upon the assignment.

Q When did Mr. Grutman first tell you you would be a witness in this case?

A Had indicated maybe a week ago that I might be, and as of Sunday night late I received a telephone call advising me that he anticipated that I would be a witness Monday.

Q And is it your testimony that until a week ago, you never had any idea you might be a witness in this case?

A No idea.

Q And you never created any memoranda or refreshed your recollection until a week ago about the facts as to which you testified yesterday; is that correct?

MR. GRUTMAN: I object to the form of that question. Creating memoranda and refreshing a recollection are two separate areas of inquiry.

THE COURT: Well, let's break it down, Mr. Mandel. Did you make any memoranda to assist you in coming to court today?

THE WITNESS: No, I did not.

Q And until a week ago, did you do anything to refresh your recollection with regard to the facts about which you testified yesterday?

A My difficult with your question is did I do anything to refresh my recollectionassumes a causal connection. From the time I handled this case in November or Decemberof 1971, there were various stages in which I was peripherally or directly involved. In addition, throughout the trial of this lawsuit I have had discussions as we frequently do within our firm, both with Mr. Grutman, Miss Bjork and others in the firm, so that my recollection has been refreshed but not necessarily in order to testify here.

Q Now, sir, did Mr. Persky tell you in 1970 or 1971 that the Buckley account was a discretionary account?

A No.

Q In the course of your discussions about the case, did you hear anybody tell you that Mr. Persky testified in court that he understood the Buckley account to have been a discretionary account?

A No, in fact I don't -- I never knew that to be his testimony and that's not my recollection of anything we had ever discussed.

THE COURT: What is your recollection?

THE WITNESS: My recollection is that we had discussed the existing case law with respect to whether or not a formal discretionary piece of paper had to be exeucted in order to state a cause of action in churning.

THE COURT: What did you understand this account was when you prepared the complaint?

THE WITNESS: When I prepared the complaint I understood it to be not a formal discretionary power having been executed but without certainty of that fact. It was our probability that we knew of no formal discretionary power having been executed in the nature of the documents that had gone through and to the extent a belief had existed that it still may have been executed but nowhere in the possession of Newburger, Loeb. We had pleaded both ways. The probability in both of our minds, to the extent we discussed it, was that there was no formal discretional power but that it might have existed, but in our mind it had no materiality as to the stating of a cause of action, and in fact would have preferred not to have a discretionary power.

Q Mr. Snider, did you have any discussions with Mr. Persky about the question of control?

A Absolutely.

Q What was the nature of those discussions?

A The discussions were what the case law required in order to state a cause of action in churning; and those -- if you want me to go further are simply yes, we had discussed control; and it's needed.

Q You understood when you prepared your complaint that control was a sine qua non of a churning claim; is that correct?

A That the broker had to control the transactions in the account e-fectively, yes, that was the sine qua non.

Q Did Mr. Persky discuss with you or did you discuss with Mr. Persky whether there was any basis for an allegation of control? Let me rephrase that.

THE COURT: No, just leave it alone. Let's see what happens here.

MR. MANDEL: All right.

A I am not certain we had any lengthy discussion about it. We had both reviewed and mentioned the answer, set off, and counterclaim, that contained in our judgment, all of the requisite allegations to state a cause of action in churning, including the fact that all of the transactions were induced, caused by the recommendations of Gross & Company.

Q Did you or Mr. Persky discuss whether he knew or had any evidence or any reason to believe that the allegations in the Webster, Sheffield answer and counterclaim about control were based on factor were accurate?

A Certainly I knew to my knowledge that Mr. Persky had no personal knowledge of the handling of the account, so with respect to whether we discussed his personal knowledge, we didn't discuss his personal knowledge. Whether we discussed his belief, we did discuss the fact that a firm of the quality and caliber of Webster, Sheffield had signed this pleading in the American Arbitration Association. To the best of his knowledge they had done substantial investigation and confirmed to their good faith belief the accuracy of each of those allegations.

Q Did Persky tell you he had inquired of anybody at Newburger, Loeb & Company with regard to their knowledge as to the accuracy of the allegations of control and churning?

A He told me neither yes nor nay.

Q He didn't say anything?

A We didn't discuss that.

Q One way or the other. You said yes, Mr. Snider, that Persky told you that he knew Gross was a -- Charles Gross was a partner and didn't know any other partners in Newburger, Loeb -- in Gross & Company on the first ground.

I don't understand the question.

MR. GRUTMAN: What does that mean, Judge. I don't follow that.

MR. MANDEL: All right, I will withdraw that question.

Q Did you say yesterday that Persky told you to name Gross and Gross & Company as the defendants in the first compalint which you dew?

A No, I did not.

Q The partnership complaint?

A No, I did not.

Q Who told you how many to name as defendants?

A That was my judgment.

Q Where did you get the name Charles Gross?

A That, the name I derived from my conversations with Mr. Persky.

Q What did Persky tell you about Charles Gross?

A Mr. Persky advised me that Charles Gross was a general partner of Gross & Company, and to the best of his knowledge, it was essentially a one-man company, and that to the best of his knowledge, Charles Gross was the account representative referred to in the Webster, Sheffield allegations to name Mr. Gross as a party defendant was based solely upon the fact that to the best of my knowledge, Gross & Company was not a partnership that was doing business, nor a partnership that had any assets, and in order to do anything worth the piece of paper that I was then preparing, I required to name and serve a partner.

Q Didn't you testify yesterday that the more partners you would name and serve, the better?

A Sure.

Q Why didn't you find out who the other partners were?

A I had intended certainly to go have a search made of the New York County Clerk's office but had plenty of time and serve other partners and in fact some time prior to the actual service had learned that there was another partner named Mabel Bleich and simply added her.

Q Do you make a search?

A Did I? No.

Q You never made a search and you never intended to, right?

A Mr. Mandel, the answer to the latter part of it was I stated I intended to make a search and I think I just said that. The answer to the first is no, I did not make a search.

Q Mr. Snider, all you had to do or have Persky do was pick up your phone to ask your client Newburger, Loeb

& Company, the partnership, who were the partners of Gross & Company, don't you know that?

A I don't know that for a fact. That's all I had to do?

Q Didn't that occur to you?

A No.

Q That the plaintiff, who had been doing business with Gross & Company, your client, the partnership of Newburger, Loeb, would have some idea of who the partners were?

A No , as I understood the situation at Newburger, Loeb, the clearning arrangement had dated back several years before, that there had not been the same partners throughout, and that as far as Gross & Company was now concerned, somehow Mr. Gross was now with Newburger, Loeb, and that there weren't the same, these transactions went back from '62 to '66. Idid not think it was such a simple process to find out who the partners of Gross & Company were or still are, if they existed, and subject to jurisdiction here in New York.

Q So despite your statement that the more partners the better, you never made any effort whatsoever to find out who the other partners were, right?

MR. GRUTMAN: We have that, Judge. This is argumentative.

THE COURT: That is so. That follows, Mr. Mandel.

Q All right. There came a time when you also put Mabel Bleich into your second complaint, right?

A Yes.

Q Who told you to do that?

A Again it is either Mr. Grutman, Mr. Roth or Mr. Persky some time after February 11th who advised me of the fact that Newburger, Loeb & Company had assigned the assignment to Newburger, Loeb & Co., Inc., and that in addition they had learned of a second partner of Gross & Company was Mabel Bleich, and I can't tell you with any certainty who that person was. It may well have been Mr. Roth. It may well have been Mr. Grutman. It may well have been Mr. Persky. If I had to guess it was probably Mr. Persky but I amot certain.

Q Were you told at the same time that Mabel Bleich was a partner of Newburger, Loeb & Company?

A No, I was not.

Q When did you find that out?

A I don't thin I found that out until some time several months later at a time when I was no longer even responsible for the matter.

Q When did you draw the first complaint in the partnership name, were you aware that Charles Gross had been a partner of Newburger, Loeb & Company?

A Yes.

Q and were you aware that Mr. Gross was a partner in the process of withdrawal?

A I don't believe so.

Q If that fact had been made known to you, Mr. Snider, would you have been aware that the partnership had a fiduciary obligation to investigate a basis for a claim against Gross before making a claim against Gross?

MR. SHAW: I am going to object to the second use of the word aware. I think it should be would you have concluded. It assumes something.

THE COURT: All right, if you want to change it that way.

MR. MANDEL: All right.

THE COURT: Go ahead.

A To the extent that the cause of action related to a period in time that Mr. Gross was not a partner of Newburger, Loeb & Co., or in any way affiliated with Newburger, Loeb & Company except as a partner of the originating brokerage house which had a contractual arrangement with Newburger, Loeb & Co. as a clearing broker, the answer to your question is I don't believe that that changed in any way the responsibility of the partnership.

THE COURT:Mr. Snider, let's be a little less legalistic about this. You are being asked to sue Charles Gross, you are being asked to sue him in the name of the partnership. You learn that he is a partner.

THE WITNESS: Yes.

THE COURT: Doesn't that tick off in your mind some responsibility to say,"Well, you know we are suing one of our own people? Shouldn't we talk with this fellow ? Shouldn't we see what his side of the story is? I don't find anything in the file saying what Gross has to say about this"?

THE WITNESS: Well, the question is to whether we should talk to Mr. Gross, I knew that there were discussions with Mr. Gross and that theywere on-going as to the handling of this account, or so I was advised, that there were discussions on-going as to the handling of this account and was also advised that there were significant other disputes and claims posted by the partnership as against Mr. Gross. We we were now dealing with was the partnership as assignee, not possessing its claim in its own right. It could have been John Doe, Inc. suing for accounts during a period of time he was not a partner.

THE COURT: Let's go back then to before you take the assignment. Before you take an assignment of the claim against another partner, wouldn't you normally as the lawyers say, "Let's see what the partner has to say about this thing? Maybe we have a lot of things we can do. He is one of our own people"

THE WITNESS: Oh, your Honor, most definitely, and at that first stage we were simply dealing with defending Newburger, Loeb in an arbitration in which a claim had been asserted. This is my first discusssion, together with protecting Newburger, Loeb against the exposure or liability that might happen if Mr. Buckley were to prevail. That is the first stage.

THE COURT: You were not aware, and you did not take any steps to find out what Mr. Gross had to say about this at any time?

THE WITNESS: No, I did not.

THE COURT: Would that have been helpful to you?

THE WITNESS I don't think so. The reason I say that, your Honor, is I was of the understanding that Mr. Gross has been ousted from Newburger, Loeb by reason of what I just mentioned in this background of claims of either mismanagement or otherwise, and that he would not be cooperative with me in connection with inquiries as to the facts.

THE COURT: That may or may not have been the fact, but whether he would have been cooperative, it would have been helpful if you could have talked to him?

THE WITNESS: I don't think so because what I had in mind was the opposite. If I had in mind the potential of suing Mr. Gross for this partnership, I did not think the canons of ethics would permit me to ask Mr. Gross to come down and now disclose his side of the transaction.

THE COURT: This man [illegible] a partner with his capital in a withdrawn state.

THE WITNESS: A, I did not know him to still be a partner. What concerned me was that if he had talked to me, I could not name him since he would be consulting with me as counsel for the partnership. If I asked him to describe to me how this account had been handled, and he made admissions with respect to the handling of that account, he would be talking to me as counsel for the partnership.

THE COURT: I see. All right.

MR. GRUTMAN: Furthermore, your Honor, I --

THE COURT: You will have a time, Mr. Grutman, to ask questions.

MR. GRUTMAN: I was going to ask the Court to take judicial notice of the appropriate canons of ethics; that's all.

THE COURT: All right. I accept his answer. Go ahead.

MR. GRUTMAN: Very well.

Q You testified a little while ago, I believe, Mr. Snider that you understood there were on-going discussions, you had been informed there were ongoing discussions with Mr. Gross about this handling of the buckley account; is that correct?

A Among others.

Q Yes. Who gave you that information?

A I believe Mr. Persky, but again it could have either been Mr. Underberger, who was handling real estate for Newburger, Loeb and particularly the New York Plaza situation, it may have been Mr. Grutman or it may have been Mr. Roth. If I had to slect I believe it to have been Mr. Persky.

Q In any event Persky or some other member of the Finley law firm told you that there were discussions underway with Gross that had been on-going about his handling of the Buckley account, correct?

A I don't think that it was about his handling rather than about the fact that a claim had been asserted and that it required resolution. I don't want to be led.

but I don't believe there were discussions in the nature of what I just mentioned as to Mr. Gross, what did happen. I don't mean those kind. As I understood it there were discussions in an effort to dispose of the matter along with other matters that I understood were open.

Q So it was your understanding that nobody at Finley, Kumble made any investigation of the accuracy of the churning claim either by asking Gross or by asking anybody at Newburger, Loeb & Company, is that correct?

A If you mean that nobody did either of those two things, to the best of my knowledge, that is correct.

Q All right. Where did you get Gross' home address?

A I learned that from either a telephone book or somebody told me. I have no recollection of where I derived the addresses for Miss Bleich either.

Q When you read the file before you drew the first complaint and indeed the second complaint, you saw that the causes of action you were suing on and the assignment purporting to transfer them were still in escrow, correct?

A Your question is impossible of answering because at the time I discussed the problem, the assignment didn't exist, so that you are combining areas that I can't really respond.

Q Let's talk about the time you drew the first complaint.

A Now, by first I want you to understand that whatever has been marked as "a first complaint" I assume is not a first complaint. I don't think I dictated or drafted that almost finished product or product that I was satisfied to have files as a true first draft.

Q I am not talking about a first draft.

A You keep saying first complaint.

Q I am talking about Exhibit X.

A If you will say that I just want you to be certain that first complaint doesn't have the implication that that's the first time pencil went to paper.

Q I didn't say anything about that. By the time you drew Exhibit X, and gave it to Persky.

A That is subsequent to the assignment.

Q Before the assignment came out of escrow, right?

A The assignment, to my recollection, did not come out of escrow until whenever the note was paid.

Q And that was in March?

A That's when the note was due. I don't know when it was paid.

Q All right, so that if February or January when you drew Exhibit X, intending it to be a complaint, the purported plaintiff was still not the assignee and did not own the claim because the assignment was being held in escrow. You were aware of that, right?

A I wa sware that the assignment was being held in excrow, yes, and I was also aware of the fact that the party who possess or could become the assignee could waive any of the conditions of additional payment if it wished.

Q And the escrow holder was Mr. Persky?

A No, it was not. It was the law firm.

Q And, nevertheless, you drw the complaint and --

THE COURT: What are the terms of this escrow? You are talking about aan escrow. What are the terms?

MR. SHAW: It is in evidence, your Honor.

THE WITNESS: As I understood it, there was a $50,000 payment to be made by Mr. Buckley to Newburger, Loeg on December 30th; there was a $25,000 payment to the law firm as counsel for Newburger, Loeb, with a promise to pay an additional $25,000 on or before March 1, 1971 and that if that payment hadn't been made the settlement, at the option of Newburger, Loab, could be terminated, and that the assignment obviously then would have no force or effect, Newburger, Loeb's general release would have no force or effect. In other words --

THE COURT: Newburger, Loeb would have to return $25,000 I assume.

MR. GRUTMAN: No. Can you recall it?

THE WITNESS: It did not say that. It did not say that.

THE COURT: Then Buckley gives up $25,000 ans risks no release.

MR. MANDEL: There is the document, your Honor.

(Document handed to the Court.)

THE COURT: Is it Finley, Kumble's contention that if only $25,000 had been received, that it would have delivered the releases and forfeited the $25,000?

MR. GRUTMAN: I don't know, Judge. I haven't looked at the document. I'd have to refresh my recollection.

THE COURT: I see. All right.

MR. GRUTMAN: Does your Honor wish me to do that?

THE COURT: It doesn't speak about returning that in the event that that is paid but obviously that would work a forefeiture which the law looks dimly upon.

MR. GRUTMAN: Your Honor, certain circumstances that is a truism, but in ither circumstances where people will fail to complete payments, as in land contracts, the law allows the seller to keep the payments that have been made and takes back the land.

THE COURT: That's where you have got a provision for it.

MR. GRUTMAN: I haven't seen the document for some time but if your Honor wishes me to look at it I will later.

THE COURT: I was just curious about it because Mr. Mandel's point is they are asserted an assign claim here where the assignment had not been perfected and on the face of the instrument that is clearly so because the assignment doesn't become effective until the second payment even against Buckley.

MR. GRUTMAN: Yes.

THE COURT: So that they were in effect asserting an assigned claim that --

MR. GRUTMAN: Was nascent.

THE COURT: -- as to which there was no assignment, effective assignment.

MR. GRUTMAN: Perfected assignment, but it could have been nun pro tunc.

THE COURT: That's the point Mr. Mandel was trying to make.

THE WITNESS: What I was trying to answer was that I understood that the bneeficiary of that additional $25,000 could waive the condition that it be the payment, and if it took an account in pursuance of the assignment, it could not terminate it if it didn't get the 25.

THE COURT: This agreement, Mr. Snider, I am not going to argue law with you because that is not the point of the case, but this agreement -- show it to him -- seems to indicate that the terms including the assignment terms are not binding on either side until the second payment has been made, which means that Finley, Kumble couldn't waive that because Buckley wasn't bound by it until the second payment.

MR. GRUTMAN: Judge, wouldn't there be an implied right to forego the second payment?

THE COURT: We are not arguing law, we are arguing a state of mind here anyway.

MR. GRUTMAN:: It would benefit Buckley if Newburger, Loeb -

MR. MANDEL: All right.

Q Now you have made the point on a number of occasons that as assignee, Newburger, Loeb & Co., and later Newburger, Loeb & Co., Inc. stood in the shoes of Buckley, right?

A Yes, sir.

Q And they could only make Buckley's claim, right?

A Right.

Q And they brought action on Buckley's churning claim, is that correct?

A Yes.

Q And Buckley's churning claim was $75,000, is that correct?

A That's what the claim was in the answer and set-off although the claim also stated that there were losses in the account of in excess of 175,000 was my recollection of what the counterclaim alleged, and what the proper damages for churning is to me is a question of law.

THE COURT: The other claim is a bad advice claim?

THE WITNESS: There are other claims, your Honor. He is asking me the churning claim was for $75,000.

THE COURT: And the bad advice was 150 or something like that?

THE WITNESS: But there was an allegation within the churning claim that the losses in the account which had been churned were in excess of $175,000; and that the damages recoverable for a churning claim is a question of law and that there are decisions that have held that losses proximately caused by churning, if proven, are a recoverable element of damages, not only the commissions paid.

Q So that when you drew your complaint based on

Buckley's $75,000 churning claim --

MR. SHAW: Objection.

MR. GRUTMAN: Objection.

MR. SHAW: It is not Buckley's $75,000 churning claim, it is Buckley's churning claim, whether it is for 75, the commissions or the loss or something else.

THE COURT: That's a bootstrap operation, Mr. Mandel.

MR. MANDEL: All right.

Q When you brought your complaint based on Buckley's churning claim, you did not bring it for the same amount of damages that Buckley had named, is that correct?

A That is correct.

Q And you made an assumption, namely that every dollar lost in the account was proximately caused by churning, is that correct?

A As an attorney, sir. if I made an assumption or I pleaded in the way to make sure that my client could properly prove whatever damages might have been, I placed the seal on an ad damnum clause, yes. That assumption was not made that every loss was proximately caused. My judgment is that it would be the defendant who had the burden of proving, if I show losses in that account, to sepaeate out those that were proximately related and those that were not because the same assumption, sir, that all commissions are proximately caused the churning is demonstrably false but Court's have held that you may recover all of your commissions even though it is clear that maybe 20 percent of the transactions are not churned, 30 percent might not be churned.

How many hairs make a beard but the problem is that a Court says defendant must separate it, so again, to the extent I have knowledge that there are losses in this account, to plead properly on behalf of my client, so that all of the losses may be shown, I allege it and it is my judgment defendant has then the burden of going forward to separate out which losses would still otherwise have occurred notwithstanding the churning.

Q You knew, did you not --

A The record wouldn't reflect that smile.

Q You knew, did you not, that Newburger, Loeb & Co. got 40 percent of the commissions?

A No, I did not know that.

Q Did you think Newburger, Loeb got none of the commissions?

Q I had assumed that it had in its contractual arrangement a provision for payment. I didn't know what the amount was nor do I believe it to be material.

Q And now, did you testify yesterday that Mr. Persky told you to assume that Charles Gross handled the account personally?

A No.

I stated that Mr. Persky said he assumes it to be Charles Gross since there was no other partner he was aware of.

THE COURT: Mr. Snider, an answer you just gave I think requires a little more exploration.

You said that if Newburger, Loeb had gotten 40 percent of these commissions, that you did not regard that as material in the pleading of this claim.

THE WITNESS: Yes, sir.

THE COURT: Isn't it -- correct me if I am wrong and maybe I am becaus you have thought about this a lot more than I -- but if Newburger, Loeb has gotten 40 percent of 75,000 in commercial transactions from Buckley, and brings a suit against Gross & Company for $75,000, it gets that 40 percent of $75,000 twice, does it not?

THE WITNESS: No, your Honor, because as -- I may be wrong also but to the extent that a person sues as an assignee, that person in my mind and to the extent it is supported by case law, which I believe it is, it wears a unique hat. It is as if it is X is an assignee standing in the shoes of Buckley. Such defenses, setoffs or otherwise that might exist vis-a-vis Gross & Company against Newburger, Loeb & Co. would not prevent the assignee from suing for the full damages that Mr. Buckley could have recovered. That if anything would be a defense to be asserted by the defendant that it would be an unjust enrichment of the assignee to receive it, but it would only be in the nature of an unjust enrichment because the assignee for purposes of pleading in my judgment could be John Doe, Inc. It's connection with the transaction is not --

THE COURT: But it wasn't.

THE WITNESS: In my mind though it is only a fortuitous circumstance that at the time the partnership was pleading it, it was subject to either being a possible co-wrongdoer. At the time the corporation was then pleading it, other than the fact that one of the main assignors might have participated in the transactions indirectly, we were now, at the time of the final complaint, dealing with a true holder that in no way participated in the underlying transactions. A corporation had only been formed in 1971 or 1970.

THE COURT: I see. All right.

THE WITNESS: Although there may well be other defenses that this defendant could pay saying I need not pay to this assignee full amount of damages because it is already benefitted by the wrong.

THE COURT: Letme just explore one other little matter with you I have a slight question about.

Mr. Mandel has brought out that the Buckley claims asserted in arbitration was for $75,000, and was for commissions only.

THE WITNESS: Yes.

THE COURT: And you have told us I believe that the total information that you possessed in preparing Exhibit X and its successor, which is the complaint filed in this court, was the Buckley answer and counterclaim. You had no information beyond that. Mr. Persky furnished you none and you got none by interviews or interrogation of anybody.

THE WITNESS: Correct.

THE COURT: Now you have asserted -- where is Exhibit X? Does somebody have Exhibit X?

MR. GRUTMAN: I gave it back to Mr. Mandel.

MR. MANDEL: Yes, I am sure I have it someplace. Here it is.

(Document handed to the Court.)

THE COURT: You have asserted damages in

excess of $249,000.

THE WITNESS: Yes.

THE COURT: I didn't quite catch it as you went along but what is the basis of the excess over $75,000 that was in?

THE WITNESS: If I might see the answer, setoff, and counterclaim.

MR. GRUTMAN: I will give you a copy.

THE WITNESS: The copy is here.

MR. GRUTMAN: Let his Honor have one, Mr. Snider. Here is your copy.

THE WITNESS: There is in Paragraph C -- excuse me, that would be 3-C on page 4, the allegation that the unusually heavy trading resulted in net losses to respondents' account totalling $174,049.

Now, to the extent that there is case law to suppose that if there is a claim in churning, one of the damages that are recoverable in that cause of action is not only all of the commissions that have been paid, although as I pointed out court's have recognized that probably not all of the commissions are directly causally related to churning, that similarly losses in that account, if experts can show resulted in the churning connection, I as a pleader then put the two claims together, so that

I would not be precluded from offering proof that not only ought it be entitled to only the commissions returned, but similarly to those losses that I could attribute to the churning of this account.

MR. GRUTMAN: And the sum of those two numbers, your Honor, is 249?

THE WITNESS: 249,049.

THE COURT: Mr. Buckley did not make that contention.

THE WITNESS: No, he did not. His firm did not make that.

THE COURT: Did not make that contention, and in bringing his action against you he had not sued you for that particular item of damage, so you were not buying peace on that item of damage.

THE WITNESS: No, I don't think that that was true. By taking an assignment I was buying full peace along with the general release from him, but I don't --

THE COURT But you were not buying freedom from a claim for$174,049.

THE WITNESS: Well, to the extent the assignment is valid, I believe I was getting an assignment that would preclude Mr. Buckley from suing the partnership of whatever claim relating to this account, because the release and the assignment when read together I believe is broad enough.

THE COURT: All I am getting at is your total information for the $249,000 is putting together 174,000 and $75,000, and the $174,000 is based upon those four lines in Paragraph C on page 4 of Exhibit 28.

THE WITNESS: Yes, your Honor. Let me pursue it because I may not be clear as to your Honor's question as to protecting a partnership from Mr. Buckley reasserting a claim for $174,000? Is that your Honor's inquiry?

THE COURT: No. I am trying to find where you got the information, which as a pleader in a federal court action, satisfied you with the --

THE WITNESS: The good-faith requirement.

THE COURT: The good-faith requirement in federal court that there was a claim for $174,049?

THE WITNESS: Yes, paragraph C, if I can now not look at it again but it said the excessive trading -- the unusually heavy trading activity resulted -- in my judgment resulted in -- is a causal connection. It is not simply that there was a loss. There is an allegation made by another firm that the unusually heavy trading activity resulted in. In my judgment, Webster, Sheffield either elected not to sue for that 174 but in my judgment there was case law that would support in good faith a claim, if the proof warranted this allegation. That allegation, if proven, would entitle me in my judgment to the $174,000.

THE COURT: I see.

All right, thank you very much.

Go ahead, Mr. Mandel.

Q You drew the Exhibit X and the subsequent complaint knowing that a member of the firm would have to sign, is that correct?

A Yes.

Q And in fact Exhibit X was signed by Mr. Persky?

MR. SHAW: Roth.

MR. GRUTMAN: No. X is signed by Persky.

A I believe Exhibit X is signed by Persky.

MR. SHAW: The one in this case is signed by Mr. Rith.

A The actual complaint is signed by Mr. Roth.

Q Exhibit X is signed by Mr. Persky. Do you know whether Mr. Persky read Exhibit X before he signed it?

A Yes.

Q He did?

A Yes.

Q And you discussed it with him?

A Yes.

Q Right?

A Yes.

Q And the allegations against Charles Gross were still based on an assumption, is that correct?

A Yes.

Q Those same allegations were carried into the complaint later served?

A Yes.

Q On behalf of the partnership, right?

A No, there was no complaint served on behalf of the partnership.

Q The corporation, right?

A Yes.

Q You said Persky told you to make the assumption or that he made the assumption that Gross handled the account because he thought Gross was the only partner. Right?

A In substance, yes.

Q You know there is no such thing as a one-man partnership, don't you?

MR. SHAW: Objection.

A No, I don't know that for a fact, sir.

Q All right. So that remains at issue. So you thought when you drew Exhibit X it was a one-man partnership, is that your testimony?

THE COURT: Mr. Mandel, my notes of yesterday were that Mr. Snider said that he knew of no other partner than Gross, that he had been told Gross was the responsible partner, right?

THE WITNESS: Yes, your Honor.

THE COURT: And secondly, he asked who this representative was and Mr. Persky said he assumed the representative to be Gross.

THE WITNESS: Yes, your Honor.

THE COURT: That is the basis for it?

THE WITNESS: That is what I answered in substance.

THE COURT: That is what he said in substance yesterday.

Q All right. That recollection is sharp in your mind, is it not?

A No, it is not, no sharper than any of the others. That's my best recollection I have no sharp recollection of that conversation.

At that time it was in no way important to me.

Q All right.

Before you prepared the corporation complaint, you knew of at least one other partner by the name, Mabel

Bleich, right?

A There is certainly a moment in time that that's true but yes.

THE COURT: Yes, that is right.

Q And in drawing the corporation complaint, you said Gross was the registered representative and Bleich had the duty to supervise him. Where did you get that information?

A That information is my pleading. When you say that information, it is certainly two things. I learned that Mabel Bleich was a partner, as I have indicated, from either Mr. Grutman, Mr. Roth, or Mr. Persky, at a time when I also learned that the assignment had been further assigned. That's one. That's what I learned from other people.

I leanred, as a result of my own legal experience that each partner would have a duty to supervise, and that that allegation comes solely as I, a pleader, not -- in my belief, that is a conclusion of law which I believe the law will warrant. It is not one of fact. That she actually supervised; rather a duty to supervise I believe I stated in my allegation. May I see this, your Honor?

THE COURT: Yes, you may.

(Document handed to the witness.)

THE WITNESS: May I see the actual complaint?

MR.GRUTMAN: Exhibit X?

THE WITNESS: No, the actual complaint.

THE COURT: The corporation's complaint.

MR. GRUTMAN: I have that here, your Honor.

(Mr. Grutman handed a document to the witness.)

THE WITNESS:No, firstly, if I could point to Paragraph 7, I stated during all relevant times upon information and belief, she was a partner, agent, and employee of Defendant Gross & Company. That was not upon personal knowledge.

The other paragraph that I added was Paragraph 19, "The defendant Mabel Bleich, as a partner in Defendant Gross & Company was under the obligation to properly review the actions of Defendant Charles Gross as well as supervise the transactions in the Buckley's account; which upon information and belief Defendant Mabel Bleich failed to do, and for which she is jointly and severally liable."

In my judgment the entire Paragraph 19 is an accurate statement of law and posseses no statements upon fact except upon information and belief she failed to do it.

Which if the allegations are true I assume the information and belief is accurate.

Q What you are saying is that Paragraph 19 contains no statements of act in your opinion?

A It contains the statement of fact that she failed upon information and belief.

Q What information?

A To do that which the law imposed upon all partners.

Q What information did you have that she failed to do something?

A The information would be that the churning occurred. To the extent churning occurred I believe the duty was breached.

Q Did you use a form or follow any model in drawing this complaint?

MR. SHAW: Objection, your Honor. Aren't we far afield?

MR. GRUTMAN: I don't mind this at all.

THE COURT: Overruled.

A I am certain I used various forms, models. This did not come enitrely from a scratch pad.

Q Do you remember what they were?

A Partially.

Q Let me ask you this:

You included serious charges against a named individual, Charles Gross, correct?

A Yes, I did.

Q In a number of paragraphs of both versions of the complaint, is that correct?

A Certainly there is no difference between the two versions if you are suggesting that there are.

Q No, no.

A All right. There were allegations of serious securities wrongdoing, yes.

Q Against a named individual?

A Against a named individual.

Q Which you did based solely on an assumption?

A Which I did based solely upon information conveyed to me, yes, which I believed to be reliable.

Q Conveyed to you as an assumption, right?

A Conveyed to me as an assumption, yes.

Q Right, and I suggest to you, Mr. Snider, that it was entirely unnecessary to make any assumptions or name any individual in order to draw your complaint, all you had to say is that Gross & Company, by an employee, partner or agent, did the churning. Am I rightabout that?

A Mr. Mandel, not only are you one hundred percent wrong, but I would think that if I were to have drafted this complaint naming only Gross & Co.with respect to a named or unnamed and unknown employee, four years later when I collect the judgment, or enter a judgment against Gross & Co. for the $249,000 plus counsel fees, that the facts might warrant, I would have a piece of paper that would make interesting wallpaper and a malpractice by the client.

Q You are misunderstanding me, sir.

A So it makes a different if I only name a partnership.

THE COURT: Mr.Snider, you are misunderstanding the thrust of his question.

Q You are misunderstanding me. I am not asking you who is named as a party. I am asking you who is identified in the complaint as personally doing the wrongful acts of churning, and I suggested to you that you could name Charles Gross as a party defendant, as a partner, but still not name any individual in the body of the complaint as the one who actually did the churning and still have fixed liability on the partnership.

Do you understand my question now, sir?

A I am sure I could have.

Q And in that way, you would have avoided on an assumption creating a public document branding and injuring a person engaged in a business, right?

MR. GRUTMAN: Objection, your Honor.

MR. SHAW: This is rhetorical.

MR. GRUTMAN: That is sophistry, that is argumentative.

THE COURT: It is argumentative. It is argumentative. I think the underlying question that Mr. Mandel intends to ask is whether, as an attorney, Mr. Snider felt comfortable in naming somebody as a securities act wrongdoer on an assumption furnished him by a partner in the firm that he was working with, on the mere assumption that he was the one who was responsible, as Mr. Snider concededly did not have even information or belief that Mr. Gross was the registered representative, and as we know in this case that fact was wholly wrong; so Mr. Snider's testimony is that Mr. Persky said he assumed that the representative that the Buckleys were talking about was Mr. Gross.

I think Mr. Mandel's question is whether he felt comfortable in preparing a complaint naming somebody as a securities act violator based upon that assumption.

MR. GRUTMAN: Your Honor, if I may use an analogy, the charge embodied in Mr. Mandel's question pending before the witness is that some individual has been erroneously branded in a public document as the malefactor who committed violations of the securities law.

How many times has this and many other courts seen negligence complaints for something as serious as wrongful debt where the owner of the car, the husband, is identified as the driver, whereas in fact, it was his lovely wife who was drunk at the time who did it. It makes no legal difference.

THE COURT: No, no, but in the setting of this case, and we are now just dealing with questions of facts to be submitted to the trier of the fact and what inferences can be drawn from it, Mr. Mandel is seeking to draw the intererence from it that Mr. Persky induced Mr. Snider to draw a complaint on inadequate information.

That's what the thrust of it is.

MR. GRUTMAN: If that's what is driven at --

THE COURT: That is the thrst of this line of questioning that he would urge upon me now as the trier of the fact, and I think he is trying to explore whether Mr. Snider, as an attorney, felt that this was a normal, usual, and did he feel comfortable with it.

MR. GRUTMAN: All right, now I understand, your Honor.

THE COURT: That's what I think he is getting at.

Mr. Snider, you have seen the flow of the argument here?

THE WITNESS: Yes, I have heard it.

THE COURT: Respond to that, if you would.

THE WITNESS: As to the extent it inquires into my state of mind as to whether or not I was uncomfortable or felt confident in doing such a pleading, if I had been a partner would I have signed such a pleading on the same basis, the answer to that is most definitely yes.

To the extent I derive information either from a partner in the firm, or if I had picked up a telephone and derived the identical information from either Mr. Risher, if he had knowledge, or anyone else at Newburger, Loeb, I would have been comfortable, based upon that.

THE COURT: I see, all right.

THE WITNESS: To the same way that I named Mabel Bleich as a partner based upon information and belief.

THE WITNESS: To the same way that I named Mabel Bleich as a partner based upon information and belief.

THE COURT: But you see you named Charles Gross as the person who churned.

THE WITNESS: And also as a partner, yes.

THE COURT: But you named him as one who churned, and that is a violation of 10b-5, and that's a securities fraud, and he is in the securities field, and as it turns out that's wrong. Whatever vicarious responsibility he has, the direct responsibility he does not have.

THE WITNESS: And I sincerely then apologize to the extent it is an inaccurate allegation, but I am certain that throughout my career there will be other inaccurate allegations based upon information, but I am sorry.

Q Mr. Snider, you have been quite meticulous in pointing out that you have made allegations upon information and belief. Now I ask you to look at Paragraph 12 of the complaint in this action which says "During that 4-1/2 year period defendant Charles Gross was the partner and registered representative of defendant Gross & Co. with which the Buckleys dealt."

Now, you do not say information and belief in that paragraph, right?

A Correct.

Q And that paragraph was based on somebody's telling you he made an assumption, right?

MR. GRUTMAN: Objection, your Honor.

Grammatically, "with which the Buckleys dealt" modifies "defendant Gross & Co.", not necessarily "registered representative." It is compound.

THE COURT: Where are we talking about?

MR. GRUTMAN: Paragraph 12, your Honor. It is a compound subject.

THE WITNESS: In fact, it says "with which" and not "with whom".

Q All right, do you adopt Mr. Grutman's suggestion and say to me --

MR. GRUTMAN: Now, Mr. Grutman didn't invent the rules of grammer.

MR. MANDEL: Let me get my question.

THE COURT: I will overrule that objection. I will sustain it as to form, but is that the position that you take, Mr. Snider, reading Paragraph 12?

THE WITNESS: No. I don't know why I said "with which", which clearly relates to defendant Gross & Co., but the general tenor of that paragraph as I drafted it was that Mr. Gross was both the partner and registered representative with whom the Buckleys dealt. That was the tenor of that paragraph.

Q You did not say "on information and belief."

A No, I did not.

Q And you had --

A I also didn't say upon information and belief 1100 transaction had occurred, or the number of dollars in the aggregate purchase.

Q Excuse me, let's go to Paragraph 13. "During that 4-1/2 year period defendant Charles Gross suggested, encouraged and effected a total of more than 100 transactions in the margin account of the Buckleys."

That was not stated on information and belief?

A That's true of every allegation other than those that relate to Mabel Bleich, to which I had absolutely no reason to know, based upon the Webster, Sheffield allegations or that the others are based upon Webster, Sheffield.

Q But the fact that Gross handled it personally was not based on anything Webster, Sheffield wrote or said; it was based solely on assumptions expressed to you as such, right?

A Yes.

MR. MANDEL: Nothing further.

REDIRECT EXAMINATION

BY MR. SHAW:

Q Mr. Snider, in your review of the file you have ascertained whether, in addition to the Buckleys being injured by the alleged churning activity, the handling of this account, that by virtue of a deficit in the account, Newburger, Loeb had been injured?

A Yes. Most definitely.

MR. MANDEL: Your Honor, this is incompetent. It does not go to this state of mind.

MR. SHAW: Just good faith.

A I think I stated that with respect to -- if I could have had this before arbitration I would not be concerned in justice and equity of looking for an assignment to make the partnership whole, my premise was that the partnership had suffered the difference between that deficit, which I understood to be approximately 300 or $250,000 in a deficit, which means out of pocket.

Q So that the assignment here involved a situation where the Buckleys had been injured, if the facts are true, by virtue of churning, and also a situation where Newburger, Loeb had been damaged because there was a deficit in the account which was not paid by the customer, is that correct?

A Yes, and I think it indicated that just to me that was coincidental.

THE COURT: If Newburger, Loeb doesn't collect on its claim, it doesn't need an assignment to get the balance.

MR. SHAW: Correct, your Honor, that's exactly the point.

THE COURT: I know, so we're talking about something entirely different.

MR. SHAW: That's the second set of causes of action. Even without the assignment, Newburger, Loeb has a cause of action.

THE COURT: I know that might be, but we are not talking about that. We are only talking about an assigned claim here, and that is all that is asserted. Newburger, Loeb is not asserting any claims directly in this pleading. They are only asserting assigned claims.

MR. SHAW: In that pleading, but I am talking, your Honor, of the pleading as it presently stands as amended in this action.

Q Are you aware that the pleading has been amended as the action stands right now?

THE COURT: That is irrelevant, Mr. Shaw.

A No.

MR. SHAW: No further questions.

MR. GRUTMAN: Just a few, Mr. Snider.

REDIRECT EXAMINATION

BY MR. GRUTMAN:

Q His Honor asked some questions to you about your feeling of comfort in having drafted this document.

Although you were not then a partner of the firm who could have signed this pleading, were you aware of Rule 11 in this Court?

A Yes.

Q And have you in the past refused to be associated with matters where you did not feel comfortable?

A Yes.

Q In this case, based upon such information as was supplied to you, did you in fact feel comfortable in drafting the pleading which you did?

A Yes.

THE COURT: He said he did.

MR. GRUTMAN: All right.

Q Lastly, having mentioned that if there was an inadvertent error in misidentifying the actual role played by Charles Gross himself in the matters set forth in the complaint, you said that you were sorry that the information as pleaded was inaccurate. Do you remember telling his Honor that?

A Yes.

Q Are you aware, Mr. Snider, of any effort made by the Finley, Kumble firm, when it learned of the idea of Charles Jordon, where it sought to amend the complaint to add him as a party defendant?

A Yes, I believe that some time significantly after this, when we first learned of the existence of another both partner and the actual account representative that handled it, we had entered into an arrangement whereby the complaint would be amended to delete Mr. Gross as the account representative to add Mr. Jordon who is a party defendant would be subject to greater discovery in any event than Mr. Mandel had agreed to, that --

MR. MANDEL: I object to this, your Honor, unless this witness has personal knowledge or produces documents. This is another attempt to slide in incompetent evidence.

MR.GRUTMAN: It is not incompetent at all.

THE COURT: Mr. Mandel --

MR. GRUTMAN: And I will produce the documents, and this man KNOWS IT.

THE COURT: Now, gentlemen, let's not --

MR. GRUTMAN: Judge, I am making a representation to the Court.

THE COURT: I am prepared to accept the fact that the pleading was amended.

THE WITNESS: It wasn't.

MR. GRUTMAN: We sought to amend it.

MR. MANDEL: No, no.

THE COURT: Why did you not succeed?

MR. GRUTMAN: Because Mr. Mandel stood in the way.

MR. MANDEL: Where are the documents?

MR. GRUTMAN: They will be here.

MR. MANDEL: What does he know about it?

MR. GRUTMAN: They will be here.

MR. MANDEL: Bring them.

THE COURT: I permitted what is only rank hearsay on the grounds that the pleading had been in fact amended.

MR. MANDEL: It has not been.

THE COURT: Though my memory didn't accord with that.

MR. GRUTMAN: We attempted to do it, but Mr. Mandel --

MR. MANDEL: Let's await the evidence.

THE COURT: I will strike it out.

MR. GRUTMAN: I just want to inquire, and I am not sure of the answer.

Q Mr. Snider, when you said some time after this, I'd like the record to reflect that you were pointing to the copy of the actual complaint which was served in this lawsuit, was that the antecedent ofthis?

A Yes, I was looking at the February 16, 1971 summons.

Q Having earlier told us in your testimony that subsequent to the time when you passed the prime responsibility for the handling of this case over to the hands of Mr. Roth?

A I believe I handed it to Mr. Gelb.

Q Or to Mr. Gelb, you continued to have some peripheral or occasional sporadic involvement in the case, is that correct?

A Yes, at one point it was substantial.

Q Did you ever learn of your own personal knowledge of any effort made in the law firm to draft an amended complaint when the firm learned of the identity of Charles Jordon as the registered representative?

MR. MANDEL: I object.

THE COURT: I will sustain the objection because it has embodied in there when the firm learned of the identity of Charles Jordon.

MR. GRUTMAN: All right;very well.

Q At some time subsequent to the service of the original complaint, did you ever learn that the firm had drafted a proposed amended complaint?

THE COURT: Including the name Jordon.

A Yes, I did, but I think I learned it slightly before the actual drafting of it, but I learned that therewas a Mr. Jordon.

Q And was that at the time that some lawyer in the office actually drafted this proposed amended complaint?

A At or immediately preceding that time I was advised that my allegation was inaccurate.

THE COURT: When was this, Mr. Snider?

THE WITNESS: My best recollection is that it is in the fall of 1971 or late summer, that somebody had indicated to me that the allegation as to who the partner was who actually hanndled the day-to-day transactions on behalf of Gross & Co. was not Charles Gross.

Q All right. And it was Charles Jordon?

A I believe I didn't know his first name. I heard Mr. Jordon.

Q Was a proposed amended complaint embodying that fact drawn in the Finley, Kumble firm?

A Yes, it was, to my knowledge.

Q Who drew it?

A I believe my best recollection is that it was Mr. Gelb.

Q And was it Mr. Gelb who handled the dealings with Mr. Mandel concerning the allegations of the proposed amended complaint embodying the name of Mr. Jordon?

A Yes.

MR. MANDEL: Now look, this is triple hearsay.

THE COURT: Sustained.

MANDEL: At this point. You bring in Gelb and bring in the documents.

MR. GRUTMAN: They will be here.

THE COURT: Sustained.

Q Beyond that you have no further knowledge about that, is that correct?

A On that one?

Q Yes.

A I have no personal knowledge other than we discussed it.

MR. GRUTMAN: No further questions.

THE COURT: All right, you are excused. Thank you very much, Mr. Snider.

We will take our break.

Off the record.

(Recess.)

THE WITNESS: No, Mr. Gelb was present and he is in the courtroom now.

THE COURT: He was present with you at the time?

THE WITNESS: Yes, he was with me at Mr. Mandel's office when the threat by Mr. Mandel was first expressed to us and I don't know whether he listened in on the telephone conversation when I called Mr. Mandel; from Mr. Gelb's apartment.

THE COURT: Any further questions?

MR. MANDEL: No.

MR. GRUTMAN: Mr. Gelb.

ALAN M. GELB, called as a witness, having been duly sworn, testified as follows:

DIRECT EXAMINATION

BY MR. GRUTMAN:

Q Mr. Gelb, are you an attorney duly licensed to practice in New York State?

A I am.

Q What year were you licensed to practice?

A 1963.

Q From what college did you graduate?

A Columbia College.

Q And from what law school?

A Columbia Law School.

Q From the time of your graduation would you trace for us what your professional life and experience has been beginning with your first employment, giving us whatever associations, bar organizations, and professional activities, honors and the like, in which you have participated from the time of your admission up to the present time.

A During the summers during which I was in law school, I worked for the law firm of Amen, Weisman & Butler. I joined that firm as an associate after I got out of the United States Army after six months' active duty and remained with that firm and its various successors until I became a member of the firm of Finley, Kumble, in which position I have continued to this day.

Q When were you made a partner in Finley, Kumble?

A Going on six years in February.

Q Will you tell us the various bars to which you are admitted?

A I am admitted of course to all of the courts in the State of New York, to the bar of the Southern District of New York, the Eastern District of New York, the United States Court of Appeals for Second Circuit, the Supreme Court of the United States.

Q Are you a lawyer who has tried cases outside of

New York State?

A Yes, sir, I have tried cases in Illinois, in Oklahoma, I think I am about to try one in California, I have also tried cases in federal and state courts in New Jersey.

Q Have you been a lawyer whose principal professional activities have been involved in litigation from the time you were first admitted to the bar?

A Yes, sir.

Q Do you also have an A.V. rating in Martindale-Hubbell?

A Yes, I have.

Q Some time in 1970, Mr. Gelb, did you have a professional connection with the matter involving Newburger, Loeb?

A Yes, I did.

Q When was the first time you in the law firm of Finley, Kumble had any professional connection or responsibility with any matter relating to Newburger, Loeb?

A Formally or informally, Mr. Grutman? I had some informal contacts with the matter during the time that the transfer agreement was in negotiation. I was present during the occasion when a number of lawyers and a great deal of activity were all going on in the premises of Finley, Kumble.

I was informally consulted by Mr. Bamberger in connection with an issue arising under Section 98 of the Partnership Law and discussed that with him; and some relevant authorities in that connection. My formal connection with the case began after commencement of the lawsuit when prosecution of the action on behalf of the corporate plaintiff was given into my hands.

Q Could you fix that time, Mr. Gelb, as to when that was?

A Some time around March of 1971.

Q At the time that you undertook the handling of the case on behalf of Newburger, Loeb & Company, I show you a document reading Newburger, Loeb & Company as assignee of claims of David Buckley and Mary Buckley plaintiff against Charles Gross, Mabel Bleich and Gross & Company, defendants. Was that the caption of the action when it first came into your hands?

A Yes, sir, it was.

Q Do you recognize who the lawyer in Finley, Kumble was who had been the actual draftsman or scrivener of that complaint?

A Yes, I do.

Q Who was that?

A Donald Snider.

Q What did you do after you took over on behalf of Newburger, Loeb & Co., Inc. in that litigation?

A Reviewed the complaint, reviewed the file, met with the clients.

Q Among the papers that comprised the file, Mr. Gelb, was there an investigation folder?

A None that I recall. I looked for such a folder.

Q Did you see any document in the file which was turned over to you which purported to be a resume or a summary of a September 15th interview with a man named Charles Jordon attended by Charles Gross and Arthur C. Silverman, a lawyer in the Golenbock & Barell firm?

A There was no such memorandum of that date or any other date in the file.

Q Are you sure of that?

A Positive.

Q What did you do after having reviewed the files that were delivered into your hands and the pleadings as they then stood?

By the way, had the answer been interposed on behalf of Mr. Gross with his counterclaim?

A I don't believe so.

Q All right. Go ahead.

A I spoke about the matter with Mr. Snider. I spoke about the matter with Mr. Persky. I spoke in detail with the people we were representing in connection with additional claims they said they had against Charles Gross f[illegible] damages of some substance or various acts, and reviewe[illegible] those matters, each in detail, making the ultimate decision myself as to which of those claims was finally asserted in the action.

Q I show you a document marked Plaintiff Newburger, Loeb & Company Exhibit 50 for identification, a letter from the law firm of Ballon, Stohl & Itzler from Ned D. Frank under date of February 22, 1971, and I ask you whether or not you ever received that letter.

A Yes, I did.

Q And was that letter, after it was received, kept in the file of Finley, Kumble?

A I am sure it was.

Q Did you ask Mr. Frank to write you that letter?

A This letter, Mr. Grutman, arose out of a conversation that we had in the Hotel Navarro at which Mr. Frank was present, a number of other people were present, and I was asked to review and examine at that meeting the various claims that were had against Charles Gross and others.

The client submitted this formal review of what was outlined to me at the time as a number of claims against

Gross and others. I also made some very brief sketchy notes at that Hotel Navarro conference.

MR. GRUTMAN: I offer that document in evidence.

MR. SHAW: I join in that offer, your Honor, for an additional reason if I may. Mr. Mandel offered the Stern memorandum of the meeting dated July 23rd, which has appended thereto a list of various claims against Charles Gross. This is a further amplification of those claims. It seems to me that with everything --

THE COURT: This is the letter that I didn't admit when Persky was on the stand.

MR. SHAW: Correct. Now there is no jury and Mr. Mandel himself has offered in evidence a list of Mr. Stern's claims and I think there is no longer any basis for withholding this from evidence.

THE COURT: This of course is not proof of the underlying facts.

MR. GRUTMAN: Simply that it was said to us.

MR. SHAW: That's correct.

MR. GRUTMAN: I am offering it only for that purpose.

MR. SHAW: Just these claims were made. Not that the claims were correct.

MR. MANDEL: One moment. Mr. Gelb has testified that he received this letter from the client.

THE WITNESS: Not in terms of direct transmittal, a physical handing from the client. It was obviously mailed and it came into our office or perhaps it was delivered by hand. It came from Ned Frank. He signed it, he discussed it with me and its contents, Mr. Mandel, and I have the notes that I made of the initial conference which correspond to what was formally typed in that letter.

MR. MANDEL: Your Honor may recall that Mr. Persky testified that for some months three or four times he had been asking Ned Frank to supply him with this information. This information comes in a letter from Frank to Persky about which Persky has already testified. Now, it comes on the stationery of Frank's law firm and is signed by Frank for the firm. Mr. Gelb is being permitted at this time to testify that the letter came to him, which is untrue on the face of the document, and that it purports to come from the client.

Your Honor, I think I am being maneuvered into a position where I have got or there is pressure on me to admit a lot of inadmissible evidence in order to avoid a serious prejudice. I believe that nothing Mr. Grutman has testified to is really admissible on the issues of this case. However, I feel in view of the nature of the evidence, THE COURT: The problem that I have is whether, and I want to look at the Canons of Ethics, whether I can permit you to be the courtroom lawyer given the credibility issue that you have thrown into this case.

MR. GRUTMAN: I think, your Honor, if I can be permitted to continue with Mr. Gelb --

THE COURT: It is a very troublesome question and I am also not quite clear as to other aspect of it which I wish to consider over the lunch hour. Mr. Mandel, let's stick with Exhibit 50 at this point. I have looked at it before, there is no question apparently Ned Frank put this language on paper.

MR. MANDEL: Let's let it in, your Honor, without proof of any --

THE COURT: I am going to let it in as a statement of Ned Frank's. I didn't want the jury to consider it because it appeared to have a lot of things in there that--

MR. MANDEL: But not for the truth of anything set forth therein.

THE COURT: It appeared to be patently prejudicial and I still feel that looking at this exhibit that that appears to be so on its face.

MR. SHAW: It is only received as proof of the fact that these assertions were made.

BY MR. GRUTMAN:

Q At some time subsequent to the service of the original complaint, did you learn that the actual registered representative who had handled the Buckley account while it was with Gross & Company and clearing through Newburger, Loeb was a man named Jordon?

A I was so advised.

Q Do you recollect who advised you?

A I believe it was Mr. Buckley.

Q And was that on the deposition of Mr. Buckley?

A No, it would have been before that deposition, Mr. Grutman, in Mr. Buckley's office at Lever House in a conference that I had with him prior to the deposition.

Q When you learned that it was not Charles Gross who was handling the account personally, but this man Jordon, did you do anything about amending the pleadings?

A At some point thereafter, I prepared a proposed form of amended complaint where I precisely described Jordon as the registered representative and employee of Gross & Company, who had handled the account.

Q Do you have a copy of that draft that you prepared?

A I have the original.

Q May I see it?

(The witness handed a paper to Mr. Grutman.)

MR. GRUTMAN: May this be marked for identification.

(Additional Defendant Finkley, Kumble Exhibit CC marked for identification.) xx

Q Was this document prepared as part of the regular work of the Finley, Kumble law office?

A By me.

Q Has it been maintained in the offices of Finley, Kumble as part of its regular file?

A Yes.

Q What did you do with this complaint after you had drafted it adding Charles Jordon to the lawsuit or identifying Charles Jordon in the pleadings?

A Sent a copy of it to Mr. Mandel among other things.

Q Do you have a recollection of when you did it and do you have a copy of the covering letter?

A I have a covering letter of September 14, 1971, over my signature on behalf of the firm to Mr. Mandel.

MR. GRUTMAN: I offer that. That will be DD for identification and I will offer both documents in evidence.

(Additional Defendant Einley, Kumble Exhibit DD marked for identification.) xx

MR. MANDEL: No objection.

(Additional Defendant Finley, Kumble Exhibits CC and DD received in evidence.) xx

THE COURT: Mr. Gelb, this "amended complaint" Exhibit CC bears on the top of the back in ink September 14, 1971.

THE WITNESS: Yes, sir.

THE COURT: Did you put that there?

THE WITNESS: No, sir, I did not.

THE COURT: Who put that there?

THE WITNESS: I do not know whose handwriting that is.

THE COURT: Does that date have any significance?

THE WITNESS: Yes, that's the date of it and, your Honor, may I find that date on its last page.

MR. GRUTMAN: It is there. Okay?

THE COURT: I see, all right.

THE WITNESS: And it corresponds to the date of the covering letter.

Q Did you make a formal motion to this court for that complaint to be deemed the complaint in this action, Mr. Gelb?

A No, I did not.

Q What happened and please describe what followed your sending the proposed amended complaint identifying Jordon to Mr. Mandel together with the covering letter Exhibit Finley, Kumble CC in evidence?

A There were a series of events, Mr. Grutman, that first antedated and then followed the preparation of that proposed form of pleading. First, I became charged, I believe some time in March of that year, with the responsibility for what was expected to be and finally emerged as a very complex lawsuit tried in Superior Court, Tulsa County in Tulsa. I was required on behalf of the client based in San Francisco to journey out there and familiarize myself with complex technological matters involving computers and the storage of data for use by computers.

MR. MANDEL: Can't we get -- excuse me, I object.

THE WITNESS: I was away for a considerable amount of time.

MR. MANDEL: Let's get to this matter without your personal Odyssey.

THE WITNESS: It is quite relevant; if you will bear with me, Mr. Mandel. It was the subject of some interest and expressions by you in writing and on the telephone to me a number of times.

THE COURT: Where is Charles Jordon in this complaint?

MR. SHAW: He is mentioned, your Honor, but he is not in the caption.

THE WITNESS: If I may point it out to your Honor.

THE COURT: He is in there but he is not named as a defendant?

THE WITNESS: He is not named as a defendant.

MR. GRUTMAN: Of the stigma of having wrongly identified Mr. Gross is palliated by this.

THE WITNESS: He is specifically identified, your Honor, in paragraph 14 as the registered representative and employee who suggested, encouraged and effected the transactions in the margin account.

THE COURT: All right. Could Mr. Snider have said if he had known about Mr. Jordon he would have named him as a defendant and that is why I was expecting to find him in this instrument as the defendant.

THE WITNESS: Mr. Snider and I often take different views of how lawsuits should proceed.

Q Mr. Gelb, you say you had this friendly conversation with your friend Phil Mandel about what you were doing out there in Oklahoma in a computer case?

A Yes. It started in March with preparation for the case, the case eventuated full blown during the summer, and going out to what I expected would be a two-day hearing, I began a seven-week non-stop trial in Oklahoma. I did not come back to New York for any part of those seven weeks.

During this period my grandfather also passed away.

The press of that business made it just about physically impossible for me to give the attention to the Newburger, Loeb case that it might otherwise have required, and so accordingly I was not able first to prepare and thereafter to deliver to Mr. Mandel the proposed amended complaint that I had promised him, and one of those amendments, of course, would have been to put Mr. Jordon in his proper perspective and Gross as well in connection with the Churning claim.

That difficulty lasted throughout the bulk of the year.

MR. MANDEL: Excuse me, you are talking about you were unable to deliver an amendment to the amendment?

THE WITNESS: No, no, no. An amendment to the original complaint.

Q We are speaking of the September 14th thing that could not be generated and delivered to Mr. Mandel until September because of your intervening other situation?

A Correct.

Q All right.

A Now, in September I did make such delivery to Mr. Mandel.

Q What did he do?

A Well, he and I were discussing at the time whether or not I would be permitted to serve this amended pleading. My time with which to serve it as a matter of right had long since elapsed. It was therefore a matter either of my making a formal motion to the court, which was time consuming, which time I could not spare, or relying on Mr. Mandel's good graces to accept it.

He originally offered to accept it, ultimately he did not, said he would not, and so it was not finally served.

MR. MANDEL: Orally or in writing?

THE WITNESS: Both orally or in writing.

THE COURT: Mr. Mandel, you may cross-examine.

Q Do you have the writings where Phil Mandel said he wouldn't take the proposed amended complaint?

THE COURT: How is this relevant to the case?

MR. GRUTMAN: Judge, we have been accused of having improperly stigmatized Charles Gross.

THE COURT: But you have now put in a piece of paper from which you can argue that you have dispelled that.

MR. MANDEL: I want them to go ahead, your Honor, because I believe the correspondence will show --

THE COURT: All right, let's not get into the -- there seems to be a lot of heat and precious little light at this point.

MR. MANDEL: That's right. I think I should at least let the record show that I said they could amend if they wanted to and they would not do it, and that's in writing.

THE COURT: All right.

(Additional Defendant Finley, Kumble Exhibit EE marked for identification.)

xx

MR. GRUTMAN: I take it you have no objection to this letter going in?

MR. MANDEL: May I see it?

THE WITNESS: That is a letter, Mr. Grutman --

THE COURT: Hold on, Mr. Gelb. It's been offered in evidence and the parties will now consider it.

MR. MANDEL: This letter is irrelevant to what we are talking about.

MR. GRUTMAN: Do you object to it? No objection?

THE WITNESS: Mr. Grutman, may I also give you a letter of December 17th.

(Defendant Finley, Kumble Exhibit EE received in evidence.)

xx

(Defendant Finley, Kumble Exhibit FF marked for identification.)

xx

Q I show you a letter from Mr. Mandel's law firm under date of December 17, 1971, inviting your attention particularly to the paragraph on the second page above Mr. Mandel's signature. Did Mr. Mandel send you that letter in December of 1971?

A Yes, he did and I received it.

Q In that did he refuse to accept the amended complaint?

THE COURT: Well, it speaks for itself. Let's put it in evidence.

MR. GRUTMAN: All right.

MR. MANDEL: Will your Honor please read it?

THE COURT: I shall. Will you please read it so that I can state your position.

MR. SHAW: May I just have a moment, your Honor?

MR. MANDEL: Yes, put it in by all means.

THE COURT: All right, received.

(Defendant Finley, Kimble Exhibit FF received
xx in evidence.)

Q Mr. Gelb, do you remember--

MR. MANDEL: May I read it?

THE COURT: Yes.

MR. MANDEL: Your Honor, will you please read the bottom paragraph on the first page.

THE COURT: I will, Mr. Mandel, I will read the exhibit.

(Document handed to the court.)

Q Some time in 1971, do you remember one of your partners named Robert Persky becoming the subject of an SEC investigation?

A Some time in late '71 or early '72.

Q You recollect whether or not there was an SEC complaint in this case against Mr. Persky?

A There was, yes.

Q Was that for activities of Mr. Persky unrelated to his performance as a lawyer in Finley, Kumble and unrelated to Newburger, Loeb?

A Yes.

Q Subsequent to the time that Mr. Persky encountered those difficulties, did you attend a conference at Mr. Mandel's office at which I was also present?

A Yes.

Q What took place at that conference?

A It was the follow-up to a previous conference that Mr. Mandel and I had had.

MR. MANDEL: May we have a date?

THE COURT: Yes.

THE WITNESS: The date I cannot fix with precision. It was some time in early 1972.

THE COURT: Before we get to that, please, there is a whole unconcluded area of this amended complaint. What happened?

MR. GRUTMAN: Mandel never accepted it.

THE COURT:: The last letter in is that Mr. Mandel writes and says if you will give me a stipulation I will sign it but we have got to conclude that.

Q Let's finish the complaint matter. What happened ultimately with the proposed amended complaint?

A What happened was I was still over-burdened with the problems of the Oklahoma litigation for which I was solely responsible. I did not have time to turn out the amended pleading. It is at or about this time incidentally that responsibility for the file was the turnover to Mr. Roth.

THE COURT: Mr. Gelb, is that different from this one?

THE WITNESS: That's it. Mr. Mandel had it in his hands all that time.

THE COURT: As I understand that letter, it said that he would stipulation with you to accept this if you would execute that stipulation on or before a certain date.

THE WITNESS: Yes, and I physically just couldn't do it. There came a time in late January or early February that I spoke with him, asked him if he would accept it, he said no, he wanted to move on with the case, he no longer wished to so stipulate with me, that he did not want Jeanne Donoghue added as a defendant in the case, and his objection was directed most specifically to the Donoghue matter rather than to the Jordon matters; and that he insisted on going forward with the remainder of his case and wanted to gear up a motion for summary judgment.

Q So do I take it, Mr. Gelb, that the draft of the amended complaint which you submitted to him died still-born?

THE COURT: Sustained as to form.

Q It never became?

A A formal pleading in the case.

Q A formal pleading in the case by stipulation, motion or otherwise?

A Yes, sir, that's the fact.

Q Now coming down to this meeting that took place at Mr. Mandel's office at which I was present --

THE COURT: What is the date?

Q You say you believe that it took place early in 1971?

A Two.

Q 1972.

A And it followed a conference he and I had had in our office.

THE COURT: You don't have a present recollection?

MR. GRUTMAN: I will not do that because of the sensitive nature of that evidence, Judge.

THE WITNESS: No, I can't give that to your Honor.

MR. GRUTMAN: You may inquire, Mr. Mandel.

CROSS EXAMINATION

BY MR. MANDEL:

Q I will try to make it short. Mr. Gelb, isn't the fact that for a long time I told you you could amend your complaint, but you never got around to it?

A Yes and no.

Q Isn't it the fact that I told you and wrote to you indicating that time was going by and my client's position to getting their money back was being delayed and I wanted you to move promptly if you really intended to amend your complaint?

A I sent you the amended pleading, Mr. Mandel.

THE COURT: Did he say that to you or not, Mr. Gelb?

THE WITNESS: In substance that was one of the things you said.

THE COURT: All right.

Q Isn't it the fact that you first sent me a proposed amended pleading in June of '71?

A I believe that's so.

Q And isn't it the fact that because of your other engagements or otherwise, the question of that pleading, your amendment dragged out and dragged out and dragged out until December?

A No, Mr. Mandel. You had it and could have said at any time as I asked you to a number of times, "I will take it" and then served your pleading in response to it. You never did that.

Q When I ultimately said "I will take it" did you give it?

A I was not there for it. What you ultimately said was "I won't take it any more."

Q In the letter Judge Owen has read.

A In the letter where you said that you wanted to get ahead with another part of the case and when you told me on the phone on numerous occasions and at depositions Mr. Mandel, "I won't take it any more, it is too late" you were quite petulant about it and there was nothing I could do about it except make a formal motion.

Q Are you talking about events before or after December 17, 1972?

A Both.

Q Did I tell you before December, 1972 -- excuse me, 1971 -- did I tell you before December of 1971 that I would not accept the amended complaint from you?

A Yes and no.

Q At any rate, I made it clear in Exhibit FF that I would accept a -- stipulate to the amended complaint if you moved and really did it, right?

A It says what it says, Mr. Mandel.

Q And you did not submit a stipulation, is that correct?

A No.

Q It is not correct?

A There was not a stipulation submitted.

THE COURT: All right, that's correct.

Q I would like to review the correspondence with you, Mr. Gelb.

A Certainly.

Q Do you have your file?

A I only have part of it, Mr. Mandel. I didn't expect to be here this morning.

Q I ask you to produce your letter to me of June 2, 1971.

A I have a copy of a letter dated June 2nd.

Q I ask you to produce your letter of -- my letter to you of July 19, 1971.

A I have your letter of July 19th.

Q I ask you to produce a letter from Donald Zimmerman of your firm to me dated July 23, 1971.

A So far I am doing pretty well. I've got it.

Q I ask you to produce your letter to me, August 18, 1971.

A You may have me there. I don't have that one, Mr. Mandel.

Q I ask you to produce your letter to me dated September 14, 1971.

A I don't have that.

MR. GRUTMAN: I think that may be in evidence, Judge. That is the one that accompanied the complaint. DD.

If that was my transmittal letter, Mr. Mandel, it is already in evidence.

THE COURT: That's DD.

Q All right.

A If you will just show them to me I will identify them for you right away.

THE COURT: Wait for questions, please.

Q Do you have your first amended complaint, your first proposed amended complaint?

A No.

Q There were two, weren't there?

A There were letters that referred to two documents.

I don't know whether they were exact counterparts, each of the other or they were different. If you have them -- I am sure you do since they were both sent to you -- just show them to me, I will identify them for you.

Q I show you the correspondence I have just read out marked as quadruple X for identification, and ask if you identify as correspondence between us.

A Except Mr. Mandel, for the correspondence involving Judge Zimmerman, it is correspondence between us.

Q Who is Judge Zimmerman?

A Judge Zimmerman is former partner of the law firm who now sits as an acting Supreme Court Justice of New York.

Q He was authorized to write to me on behalf of Finley, Kumble?

A You bet.

Q All right.

MR. MANDEL: I offer quadruple X in evidence.

MR. SHAW: No objection.

xx (Defendant Exhibit XXXX received in evidence.)

Q Now on June 2, 1971, you sent me a proposed amended complaint, is that correct?

A That's what the letter says.

Q And you said it was your understanding that I was prepared to execute an amended stipulation granting certain adjournments of time; is that correct?

A I don't have the letter before me.

Q All right.

A If you make that representation to me, Mr. Mandel, I will certainly accept it.

Q You have a copy of my letter of July 19, 1971, to you?

A Yes, I do.

Q I wrote to you, "I have tried to reach you several times on the telephone but apparently you have been out of town." Is that true?

A Yes, I sure was out of town.

Q All right. It is now about 40 days since we spoke to each other after our deposition session with Mr. Buckley. Was that true?

A You have me on the number of days, Mr. Mandel.

Q At that time you wish -- I wrote "At that time you told me you wished further time to respond to the answer and counterclaims and that you would probably wish to amend the complaint by adding new claims." Was that true?

A That you wrote it?

Q Yes.

A Yes, I wrote it.

Q Was my statement true?

A Yes, the statement was true.

Q All right.

THE COURT: What is the date of this?

MR. MANDEL: July 19, 1971.

Q I said "We discussed the possibility of a stipulation allowing you to amend the complaint and ultimately we agreed that you would prepare for my examination a proposed amended complaint incorporating such additional claims." Was that statement true?

A That we had such a discussion?

Q Yes.

A Yes, we had such a discussion.

Q All right. Then I went on in this letter of July 19th as follows: "Since your clients are holding my client's money (improperly and fraudulently as we have alleged in the counterclaims) I must now insist that you proceed promptly in accordance with our understanding. If you still wish to amend the complaint, please let me see a copy of the current proposed amendment. If not, will you please reply to the counterclaims." Did I write that to you?

A That's what the letter says.

Q And were my statements true?

A Yes and no, Mr. Mandel, and I don't mean to ascribe any falsity to you in making this recitation of your view of it. As I recall our conversations, Mr. Mandel, your main objection was not to my assertion of the claims but to adding Jeanne Donoghue, and that was a problem that you didn't get over.

Q My dear friend, have you forgotten that I added Jeane Donoghue as a party in the answers and counterclaims?

A Not at all. Not at all but that's what -- that's you see what forced us to do it by way of reply so these claims Mr. Mandel, were all ultimately included but added by way of reply once you elected to add Donoghue yourself.

Q When did I add Donoghue?

A I think that was in February of 1972, February 28th if I am not mistaken. Is that right? Oh, I'm sorry, that was in your second amended pleading. I don't recall the date of the first answer and counterclaim.

THE COURT: Gentlemen, we are going to take our noon recess at this point. We will recess until 2 o'clock.

(Recess to 2 P.M.)

level, there is nobody else in my law firm who can conduct this trial except me. I don't say I am not expendable. I don't say that I am indispensable, but on a practical level, and we are trying this without a jury, I am the only one. I have spent 13 weeks around the clock seven days a week immersing myself in this and there just isn't anybody else who can pick up.

THE COURT: I appreciate that problem too. This is a very troublesome point in this case. Let's go ahead and we will see where things go from there.

Mr. Mandel, you were cross-examining.

ALAN GELB, resumed.

THE WITNESS: Mr. Mandel, you had put a question to me just before the luncheon recess as to the time of your adding Jeanne Donoghue and I think I may have misled you by an answer I gave.

CROSS-EXAMINATION CONTINUED

BY MR. MANDEL:

Q You didn't mislead me, sir.

A Then I may have unintentionally misled the court. If you will allow me to --

Q I will continue my cross-examination.

A Very well.

Q The fact is --

THE COURT: Mr. Gelb made a mistake in an answer.

MR. MANDEL: Yes.

THE WITNESS: I think I may have.

THE COURT: Let's let him correct it.

THE WITNESS: The question, your Honor, was as to Mr. Mandel's adding Jeanne Donoghue. My answer should have been that he never added Jeanne Donoghue to the case. Jeanne Donoghue was added -- was sought to be added by me in the proposed form of amended pleading as a named defendant in the case. When Mr. Mandel answered, some time in 1971, perhaps it was May, he never put her in the caption of the case although she was identified in the body of the pleading; and as I understand it, in no subsequent pleading has she ever been added to the body of the case. I therefore understand that she is not properly before the court.

THE COURT: No, she must be because I ruled that she was at some point.

THE WITNESS: Then that was the first time it happened. That was the first time it happened, your Honor.

THE COURT: I am not quite sure of the procedural setting but I remember a motion to strike her as a party and I denied it.

THE WITNESS: Very well.

MR. MANDEL: Your Honor is absolutely right.

THE COURT: So she is here.

THE WITNESS: What I am trying to get across to your Honor is in response to Mr. Mandel's question that I was trying to add her in the nice, regular, formal way that these things are done in litigation, and that he and I were at some sword's point on that issue, he didn't want to lead me, and I wanted that to be done.

Ultimately, she got into the case through one door or another.

That's it, Mr. Mandel, but she was not in your original answer as a named defendant third-party plaintiff.

Q Mr. Gelb --

THE COURT: Let's not quibble over little matters. The record in that regard I think has been established, has it not?

MR. MANDEL: I don't think all of the documents are before your Honor.

THE COURT: Let's put the documents in. They will do the task for me, will they not.

BY MR. MANDEL:

Q In your first proposed amended complaint did you seek to add Jeanne Donoghue as a party?

A I have no recollection of that, Mr. Mandel. You will have to show it to me.

call was made?

A 787-3651, area code 212.

Q Mr. Gelb, what is the reason you did not file your amended complaint when I offered to stipulate?

A I think, Mr. Mandel, we are talking about two different amendments. There was one amendment--

THE COURT: He is talking about -- you are talking about the same amendment. It is the second one.

Q The second one.

MR. GRUTMAN: September 14th?

MR. MANDEL: Yes.

THE COURT: He is talking about the post-December letter. There is a letter in December, '71, is it?

THE WITNESS: There is the September letter of transmittal and there is Mr. Mandel's December something letter in which he gives me until January.

THE COURT: That is about the stipulation and he is talking about following that letter.

THE WITNESS: Yes.

It is my recollection, Mr. Mandel, that we were still at odds on the question of adding Jeanne Donoghue but I think that I didn't do it because I just couldn't possibly get around to it.

Q My letter didn't indicate we were at odds about anything, did it?

A Your letter says what your letter says. But you wanted the reason Mr. Mandel, and the reason is, if my recollection can tell me that reason, I just couldn't get around to it.

Q All you needed was -- how many lawyers are there in your office?

A A lot more now than were there then.

Q How many then?

A In the litigation department there was Mr. Grutman, there was Mr. Roth, and myself as partners. We may have had three other associates. That's approximately correct.

Q And there was nobody you could get in a two-week period to write a stipulation saying "It is hereby stipulated that the annexed form of amended complaint may be served by the plaintiff herein, so ordered."?

A Mr. Mandel, the last time I took a vacation was 1969. To this date I have not taken another. The answer is it may have been a want of capacity on my part, but I have felt myself rather burdened and rather busy; and I was not able to get to that, as indeed, I have not been able to get to a number of things of greater importance, perhaps.

Q So that from June until January, on and off I was waiting for you to get around to amending your answer--

A No, you weren't.

Q -- and you were asking me and writing about it but when it came to the crunch, you didn't have the time to do it, right?

A No, wrong; wrong. You weren't waiting for anything. You were moving forward. You were taking depositions. You were getting disclosure. You were getting discovery by the time I got out of this case and Herbert Roth got into it there was a substantial pile of documents on your table that you had not even been able to digest and I recall that the big wad of paper that Mr. Buckley produced.

Q Do you recall that you asked me, and I agreed, that I would not bring any motion regarding your complaint until we settled the question of whether you were going to amend your complaint?

A There was discussions of that nature, Mr. Mandel, up until the time when you rang down the curtain and said "Too late you can't do it any more."

Q No, I said -- I rang down the curtain in advance. I said --

A You were always doing that, Mr. Mandel.

Q No, no.

THE COURT: Mr. Gelb, please.

THE WITNESS: I am sorry, your Honor.

THE COURT: Mr. Gelb, you are here now -- lawyers are traditionally bad witnesses. You are here as a witness.

THE WITNESS: Guilty.

THE COURT: You are here to answer responsively to proper questions. If the questions are improper, there are able counsel out there that are going to object, so just listen to what you are asked.

THE WITNESS: Very well, your Honor, I apologize.

THE COURT: And just be a fact purveyor for us, will you.

THE WITNESS: Okay. The question, Mr. Mandel.

Q I rang down the curtain giving you notice. I said if you will do it by a certain date, fine; if you will not, I won't wait any longer, and I won't agree.

A Is that a question?

Q Yes.

A What's the question? That what happened?

THE COURT: He is saying isn't that what he put to you.

Q Isn't that what the letter said?

A That is what the letter said but it is not all you said to me.

Q I see. What did I say to you orally?

A On a number of occasions, because as I told you, "Phil you are trying to build a record on me and I don't have time to respond." You write in the letter that you are going to close me down and pull my time and then you say "Okay Alan you can have more time, you can have more time I understand your problem, I understand the difficulty" and what you kept on saying to me was "Don't stop me in the rest of the case" and I said "Phil I will not. There are witnesses for you to examine. There are documents for you to see, there are many things for you to collate and go through so you will not be disadvantaged. Just don't call me down on my time because I can't get to it." So they both happened at once. You both built the record on me, and gave me the hope, ultimately proved to be false, that I could serve that pleading, but Mr. Mandel, I think it was a matter of indifference whether the pleading was served or not. All of the claims got in except for the fact of Jordon's particular nature of participation. The identification of Jordon as the RR, rather than Gross as the RR was the only main difference. We got everybody else in, all the other claims are in this case and are here being tried.

The atmosphere at that time Mr. --

THE COURT: There is no question pending.

MR. MANDEL: Yes. I have nothing further.

MR. SILFEN: Your Honor, would it be appropriate for me to ask Mr. Gelb a few questions please?

CROSS-EXAMINATION

BY MR. SILFEN:

Q Mr. Gelb, I believe you testified in response to a question from Mr. Grutman that a time came that your office asked to be relieved of the responsibility of further representing the Newburger, Loeb Corporation?

A Yes, sir.

Q And a motion was made in this court for permission to withdraw as attorneys of record for that corporation?

A Yes, Mr. Silfen.

Q Do you recall at the same time that you made a motion or that your law firm made a motion to be relieved of the responsibility of representing the additional defendants on the counterclaims of Sloane, Muh, and Kayne?

A I believe that was the fact.

Q Were you familiar, Mr. Gelb, with the basis that your law firm undertook the representation of additional defendants Muh, Kayne and Sloane to begin with?

A Yes.

Q Would you tell the court what was the basis and the understanding with respect to that representation?

A There was an understanding that the corporation would pay legal bills.

Q Would it be a fair statement to say that at the time that the corporation no longer was able to pay your firm's fees for services, that coextensively, your firm asked to be withdrawn as counsel for all of the other additional defendants on the counterclaim other than your law firm and Mr. Persky?

A Yes, I previously so testified before Judge Owen. To the extent that we represented other people.

Q Right?

A Yes.

Q The representation was coextensive corporation and the individuals.

A The corporation was paying for the individuals' legal fees, yes.

MR. SILFEN: I have no further questions.

MR. MANDEL: Excuse me, there is one question which I should have asked but didn't.

BY MR. MANDEL:

Q Can you fix the date definitely when Mr. Persky was being examined by the SEC?

A No, that went on for quite a period.

Q When did it start?

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ROBERT MUH, called as a witness in his own behalf, having first been duly sworn, testified as follows:

U.S. DISTRICT COURT
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DIRECT EXAMINATION

BY MR. GLATZER:

Q Mr. Muh, are you presently employed?

A Yes, I am self-employed.

Q In what business?

A I am a business consultant.

Q How long have you been in your own business?

A Approximately two-and-a-half years.

Q Could you give me a thumbnail sketch of your background, say from college until 1970?

A I graduated from MIT with a Bachelor of Science degree in 1959, immediately entered Columbia Business School, and received a Masters in Business Administration in early '61. I entered the United States Army, served as a Second Lieutenant for a six-month period. When I got out of the Army I returned to graduate school at Harvard University, to continue studies in business.

While I was at Harvard I took the Foreign Service Officer exam, and as a result of that, I was recruited to go to work on a full-time basis in 1962 for the Central Intelligence Agency; and I worked at the CIA for a period of two years

In 19 I believe it was 64, I left the Agency to return to graduate school at Columbia University, where I had an appointment as an instructor and was pursuing a Ph.D. at Columbia Business School.

In February of '66 I completed all of my course requirements and exams except for my dissertation and I went to work for the management consulting firm of McKinsey & Co. here in New York City.

I was with McKinsey & Co. for approximately three years, when I left to be one of the founding partners, one of the formers of Risher, Muh & Co., Inc., where I worked until February of 1971 when I became one of the shareholders of Neuburger, Loeb & Co., Inc.

While at Risher, Muh, I was also an adjunct assistant professor of finance at Columbia University.

Q Did there come a time when Risher, Muh & Co., Inc. was engaged by Neuburger, Loeb?

A Yes.

Q When did that occur?

A In late July or first week of August of 1971.

Q 1970?

A '71, excuse me.

THE COURT: What does finance involve, Mr. Muh, when you teach finance? What is that?

THE WITNESS: My areas of specialty were in areas of corporate finance, raising money for corporations, how corporations are financed, public offerings, private placements, and areas such as that.

THE COURT: This is teaching graduate students?

THE WITNESS: Yes, sir, on the Masters 3 level.

THE COURT: Very good.

Q When you were engaged by Neuburger, Loeb, did you enter into a contract with them?

A No, it was a -- not a written contract. It was an oral engagement, if we can call it that, where we could have been terminated by either party just by notification.

Q Were there financial arrangements made?

A Yes, our firm was retained initially at the rate of $5000 per month for -- which involved the virtual full-time services of both Mr. Risher and myself with an understanding that that was substantially below what our normal billing rates would have been, and that if our services were to be continued after the first month or two, that there would be an increase to approximately an $8000 level.

Q Did that subsequently occur?

A Yes, it did for a very short period of time, I believe.

Q When to the best of your recollection did it occur that the rate was changed?

A I believe November. I am not positive.

Q With whom at Neuburger, Loeb did you negotiate and who at Neuburger, Loeb engaged Risher, Muh & Co., Inc.?

A Primarily Fred Kayne.

Q Did you know Mr. Kayne before you were first in contact with Neuburger, Loeb?

A Yes, I had met Mr. Kayne while at MIT where Mr. Kayne was also an undergraduate student.

Q Did you stay in contact with him thereafter?

A We maintained a social contact. We had never had any business transactions or dealings but had maintained a social contact even though he had moved to California quite a few years before.

Q Can you fix the date on which you began your engagement with Neuburger, Loeb?

A I believe it was August, about the second or third week of August, 1970.

Q Did you have any understanding when you began as to what your duties would be specifically?

A Yes, Mr. Kayne related that there were serious financial problems at Neuburger, Loeb, and that he asked for our assistance initially in merely helping to better understand the nature of the problems, to get a better handle on this, and to be able to provide him with an in-depth analysis of all the different financial problems that the firm was facing, the most obvious being the fact that they were suffering dramatic losses on their P&L statement.

Q And after you were engaged did you begin to do work in connection with the description that Mr. Kayne had given you of the problems?

A Yes, one of the things that I had been accustomed to doing in my consulting career both at McKinsey and at Risher, Muh & Co., Inc. was to do analyses of different corporations to look at specific problems, and to report on a course of action, a recommended course of action based on our analyses.

During the month of August, I think it was the first three weeks of August, Mr. Risher and I spent virtually fulltime working with the different partners and managers and people at Neuburger, Loeb & Co. They were all very cooperative. I had numerous meetings and was provided with information by their controller, by the partners who ran their back office, by Mr. Frank, who was their compliance officer, and they provided -- all information that we asked for was made available to us.

As a result of that, on I believe it was about

August 21 or 22, our firm prepared a written report which we presented to Mr. Kayne for -- several copies to Mr. Kayne -- for presentation to the Executive Committee of Neuburger, Loeb.

Q I show you a copy of a document addressed to Fred Kayne from Risher, Muh & Co., Inc., entitled, "Interim Progress Review Neuburger, Loeb & Co., August 21, 1970," which we have marked as Additional Defendants on Counter-Claims Kayne Exhibit J for identification, and ask you if this is a copy of the document that I and Mr. Risher prepared.

A Yes, it is.

MR. GLATZER: I offer it in evidence.

MR. MANDEL: I believe it is irrelevant, your Honor. I don't know what issue it can bear upon, what evidentiary value it has.

MR. SHAW: I think this is further support for testimony that is already in the record from Mr. Risher when he talks about leases and clearing agreement. It is already in evidence, your Honor, but I think that it is relevant.

THE COURT: This is in evidence?

MR. GLATZER: The document is not.

MR. SHAW: In testimonial form.

THE COURT: You have no objection, I take it?

MR. SHAW: No objection at all, your Honor.

THE COURT: Mr. Mandel objects on the ground it is irrelevant. You argue it is relevant. I will receive it in evidence.

MR. SHAW: I so argue.

xx (Additional Defendant Kayne Exhibit J received in evidence.)

Q Mr. Muh, after you prepared the report that's been identified as Additional Defendant Kayne Exhibit J, what did you do next?

A In the report, we commented on the several areas, problem areas that we felt after this roughly one month's investigation, that needed most immediate attention. They were the general operational losses that the firm was encountering, the basketball team that had been acquired by Neuburger, Loeb, the fact that there had been notice of significant capital withdrawals already prior to when Mr. Risher and I were retained by the partnership, and that these withdrawals were to commence in November of that year. Notice had been given though, formal notice; and that there were tremendous excess real estate downtown.

Based upon these statements, and the report that we prepared, we allocated responsibilities on a project basis.

Q So the record is clear when you say we, would you say who it is?

A I am sorry. At a meeting I believe it was with Mr. Kayne and Mr. Risher, we divided up these areas as I discussed, into specific projects, at which time my major responsibility was the Buffalo Braves basketball team.

Q What responsibilities did Mr. Kayne have and Mr. Risher have?

A Mr. Risher's primary responsibility initially I believe was the back office problem and working with -- attempting a new clearing agreement, and Mr. Kayne I believe was going to be working on the One New York Plaza lease problem, if I remember correctly.

Q Did you do anything in connection with the basketball team after you met with Mr. Risher and Mr. Kayne?

A Yes, the months of September and October I devoted substantially all of my time to that single project. In fact during the month of October I was out of the city, and actually was in Buffalo, New York, from Monday through Friday, I believe every single week of that month.

I had gone up with one of the partners of Neuburger, Loeb, Mr. John F. Settel, and he and I were handling the various negotiations to attempt to get the partnership out from under the tremendous financial responsibility. We were working on two distinct programs. One, was a possible public offering, a registration statement, but we were encountering some fairly difficult opposition from the SEC to that public offering because of a conflict in interest. Neuburger, Loeb was going to be the managing underwriter on an entity that it owned and the SEC frowned upon that, and so it would have been necessary to have gotten an independent underwriter which the partnership had been in discussions with several but it was having a difficult time in finding someone who would give a firm commitment to do an underwriting.

While in Buffalo Mr. Settel and I worked together on also attempting to find a private buyer for the team, again an endeavor that I know Mr. Gross had been involved with earlier than that and several other partners had but they had not been able to find a buyer up to this point.

Q Did you eventually sell the team?

A Yes, in October I was introduced to a gentleman, a Mr. Paul Snyder, who indicated a very strong interest in purchasing the team. He had just sold his private business to a major corporation and had received a very significant payment, and during the month of October Mr. Settel and I, with the assistance of the firm of Goldenbock & Barell, who were representing Neuburger, Loeb's interests at the time, negotiated the sale to Mr. Snyder and we closed on that sale on November 2 or 3, I don't remember the exact date.

Q 1970?

A 1970.

Q After the conclusion of the basketball team transaction, what did you do next in connection with Neuburger, Loeb?

A I returned to New York, and continued to work with the partnership on certain profit and loss areas. I devoted a substantial amount of my time to the real estate problems that the firm still had. Those were over and above the One New York Plaza lease which was the one single largest one, but in fact, the firm had significant other real estate obligations as a result of, one, having gone out of the clearing business there was a lot of commercial real estate under lease that was no longer required, and secondly, the firm had closed a number of retail offices during the year, and so there were probably eight to ten physical locations around New York City that were under contractual lease that the firm did not have business use for.

Q While you were working on the problems of the leases, did you work on any other problems at that same time?

A Yes, I also worked on specific cost reduction projects. A couple that I think of specifically were with

Bunker-Ramo and Dow-Jones, the various companies that supply the basic data and equipment to a brokerage firm. Those were also contracts that had been entered into sometime before, and some reductions were available, cost savings were available on those contracts as well.

Q Did you handle any matters in connection with branch offices or registered representatives during that period?

A Well, one of the things that occurred during this period -- the fact that the firm was in financial trouble just was no way it could be kept secret, and people and the employees of the firm were aware of it. The fact that the firm had been in effect forced to go out of the clearing business became very well known throughout the entire company, and as you might imagine, since the heart of a brokerage firm are its registered representatives, there was real concern that the RRs might feel that the firm was going out of business, might leave and go to work for other firms where they would be more secure, and in fact this kind of a question often arose, and I found myself on several occasions, on many occasions having to visit the -- there were really three offices in New York City, one of which was at the corporate office but the other two branch offices to talk with the office managers, to talk with the various registered representatives, and to try to give them assurances that the partners, those of us who were working as consultants, were doing everything possible to keep the partnership alive and open and for them not to leave the sinking ship, as it were and so I did have involvement with the branch offices on that basis.

Q In connection with your analysis of the leases, did you prepare any report or written analysis?

A Yes, there -- in fact there were several schedules I prepared but there was one master schedule that listed all of the lease obligations of the firm, the dates, the dollar amounts associated with it, and what clauses for terminating those leases if any were contained in those leases.

Q I show you a document entitled, "Space under lease to Neuburger, Loeb & Co.," identified as Additional Defendants on Counterclaim Kayne Exhibit K, and ask you if that is the document to which you just referred?

A Yes, it is.

MR. GLATZER: Mr. Mandel, do you have any objection?

I offer it in evidence.

MR. ESTERMAN: No objection.

MR. SHAW: No objection.

xx (Additional Defendant Kayne Exhibit K received in evidence.)

Q Mr. Muh, during the period prior to mid or late November, 1970, were you involved in or aware of any efforts to raise capital on behalf of Neuburger, Loeb & Co.?

A Yes, there were several. I think the very first effort that I was aware of was probably back in the August-September period by Mr. Kayne when he was attempting to get the various general partners of the firm to put up substantial capital into the firm, those who were in deficit to make up their deficit positions but in addition, to get even those who were not, if they were in a financial position, to invest in the firm.

Q Did you have any conversation with any partners of the firm with regard to that matter?

A I don't believe it was in August or September. I did have conversations with Bob Neuburger and Andy Neuburger and I think also Bob Stern about their ability to invest money into the firm at the very least to make up their deficit positions, but that might have been November. I don't remember the date of those discussions.

Q Were there any activities in connection with solicitation of outside investments?

A Again, the dates are a little unclear in my mind. There were tremendous efforts on the part of virtually all the general partners during the period from September through December to try to one way or another raise additional money for the firm. Bob Neuburger was probably the most active individual, I think, in this area. I know through his counsel, Mr. Freund, that he had approached several people. I even believe I had introduced or suggested the names of some brokerage firms, that there might be some merger partners or people, but considering the financial condition of the firm as it appeared at that time and the rate of loss more than anything else that the firm had suffered during the prior year or so, no one was having any success at finding anyone willing to step up and put any significant dollars into the partnership.

Q In November, as a result of Neuburger, Loeb's problems which had been discussed at length here, did you become involved in any efforts to reorganize Neuburger, Loeb?

A In very late November, and perhaps the first of December but in that first week in December-last week of November period, Mr. Risher and I did make a proposal to the general partners, a proposal, I might add, that had first been raised to me by Bob Neuburger, I believe had come up at various times, if in fact we were asked if we knew of any way of infusing new capital into the firm.

I am sure that if Bob asked me he had asked many people and I was just one of many that he had asked because he, I think, more than many of the other partners felt a great concern about the implications of a personal bankruptcy, and so in this late November-early December period Mr. Risher and I presented a very short proposal to the partnership that in effect merely called for an extension of the limited partners and subordinated lenders' capital and that we would over a period of time -- we didn't have any commitment or guarantee that we could do it at that point -- attempt to raise additional capital for the new firm.

Q I believe that proposal has been marked as Plaintiffs' Exhibit 122?

MR. SHAW: Yes, it was received in evidence in the course of the examination of Mr. Risher.

MR. GLATZER: Can we stipulate that it is the same exhibit?

MR. SHAW: Yes.

MR. GLATZER: Mr. Mandel, to save time can we stipulate the original proposal Mr. Muh referred to is the exhibit that was marked Exhibit 122 when Mr. Risher was examined?

MR. MANDEL: Yes, if you say so. If we find out there is an error we will correct it.

MR. GLATZER: Yes.

Q So I understand you submitted the proposal that has been marked as Exhibit 122. What happened after that?

A Within a few days of submitting that proposal, I believe it was Bob Neuburger -- yes, I think it was Bob Neuburger informed Mr. Risher and myself that the proposal would not be accepted, and in fact, the partnership no longer felt the necessaty to continue the services of Risher, Muh & Co., and informed us that he was terminating those services, and that was about the 7th or 8th or 9th of December.

Q What happened next?

A Well, for a couple of days we were no longer employed by Neuburger, Loeb. I believe a day or two later we received an invitation from Mr. Steefel of Stroock & Stroock & Lavan to attend a meeting on December 10, I think is the date, at their offices, a meeting of the general partners and the limited partners, and it may have been Mr. Richenthal that called, I don't recall now, but one of the two gentlemen asked Mr. Risher and I to attend that meeting.

Q Did you attend the meeting?

A Yes.

Q The meeting has been testified to at length, but can you just briefly describe what happened there as concerned you?

A There was a large gathering of people at the Stroock & Stroock & Lavan offices. Mr. Freund made some comments initially to the extent that he did not feel that Mr. Risher and I should be present. I believe Mr. Steefel commented that he had invited us and, therefore, wanted us to be in attendance.

Basically, there was a presentation by Mr. Robert Neuburger and really by Mr. Steven Gutman, who had been a former liquidator with the New York Stock Exchange, and they were attempting to, as best I recollect it, accomplish pretty much the same type of reorganization that Mr. Risher and I had proposed but with Mr. Gutman as the leader of their management group.

And they made their presentation at which time Mr. Steefel asked that Mr. Risher and I and I think the general partners that were present to leave the room; but to please wait in one of the outer offices or in the hallway, until the limited partners could discuss the matter among themselves.

Q Would you characterize your leaving of the room as having been thrown out?

A Oh, absolutely not.

Q You then waited in the anteroom or in the outer office?

A Yes.

Q What happened next?

A Sometime later we were called back in, and again I don't recall if it was Mr. Steefel or Mr. Richenthal, it was probably Mr. Steefel, informed us that the limited partners felt that they had to take a much stronger role in the financial affairs of the partnership in light of its financial predicament, and that they would be willing in principle to accept the proposal that Mr. Risher and I had submitted but with one very major change, and that was that instead of our attempting to raise additional new capital, that we would be able to bring a minimum of $1 million of new capital into the new corporation.

Q What did you say in response to that statement?

A Well, we had already attempted, gone out looking for capital, and so we had spoken to various people, we had spoken to the Finley, Kumble firm, we had spoken to several people I know on Wall Street, and at that point in time the only indication we had as of that December 10 meeting of any possible investor was a comment from Mr. Persky that he had a client that might be interested in putting approximately $1 million of Bacardi stock up as capital, for the firm. That was the only real indication we had, and we commented upon this at that partnership meeting I believe, and said that we would do our best, if that was a condition that we would do our best over the next few days to see if in fact we could firm up that capital commitment.

Q What did you do next?

A Naturally over the next few days we had many meetings with the different people involved, with partners, with Mr. Persky, and I believe it was on or about the 17th or 16th we were assured by Mr. Persky that subject to final terms of the agreement, we would be able to get a commitment for this $1 million but that it would be subject to very, very strict limitations in terms of the capital of the firm.

Mr. Persky was very, very strong in his comments to me about wanting to absolutely minimize the risk of that million dollars, which I can certainly understand, and during the next two-week period, there were numerous negotiations and meetings with the limited partners and then eventually with the subordinated lenders to actually pull together this huge mass of documents and of facts and so forth that had to be compiled for the closing or for the first closing which was scheduled for December 30.

I should comment, which I haven't even said, that during this entire period, there were almost daily communications and reports to the New York Stock Exchange and they were constantly involved with what was going on, there had been three or perhaps four times during this period when the notices of capital withdrawal limited partners had come due, and frankly, more due to the negotiating ability of Mr. Risher than anybody else we were able to get extensions for the partnership of those capital withdrawal notices; and the Exchange was applying tremendous pressure on the firm to get us to -- their choice in my opinion was a liquidation. Once the back office had been cleared up the Exchange, as far as they were concerned, had written Neuburger, Loeb & Co. off and didn't care about bankruptcy for the partners or anyone else.

Q From the period of approximately November 15, 1970 until December 30, 1970, would you describe Mr. Kayne's role in your propositions?

A Well, Mr. Kayne resigned approximately around the date in question, I don't remember the exact day; frankly some problems developed between Mr. Kayne and Mr. Risher, and they were as -uch personality conflicts, if I can call them that, as anything else, and I think they were both kind of glad to see Mr. Kayne going back to California, which he did, somewhere around the 1st of December.

As a result even though very honestly I was not in favor of it, the initial proposal that Mr. Risher and I prepared was strictly on our own behalf. Mr. Risher just did not want to have Mr. Kayne involved in any such proposal.

Q Did Mr. Kayne also have his reasons?

A Well, as I think has been testified here, I missed some of it, Mr. Kayne had a series of personal problems as well as business frustrations and so forth, and I think my understanding was he was very content to go to California, be a registered representative, which is what he had been before he had been ever involved in management of any brokerage firms, and as a registered representative I have always been able to make a very significant living, frankly considerably more than as a manager of a firm could ever have made and I think he was quite content to go back to being a RR in the California office of Neuburger, Loeb.

Q Did a meeting take place at the Finley, Kumble office on December 30, 1970?

A Yes, it did.

Q Did you attend that meeting?

A Yes, I did.

Q Would you briefly again describe what took place there?

A Well, it was an all-night session that I must admit I have often confused in my own mind with the closing of February 11 as I am sure Mr. Mandel realizes from my deposition.

But as I best recollect it now, it was a meeting at which all of the i's were dotted and t's were crossed concerning a transfer agreement, and that most of the parties involved were present or through their attorneys, and we had a time deadline because the Stock Exchange had told us they would not grant any further extensions unless an agreement in principle was submitted to them. And so we felt we had to have a document ready on the 31st that was at least substantially completed to give to the Stock Exchange, and so we had an all-night session that night in order to get that document to the Stock Exchange.

Q Was Mr. Silverman present at the meeting?

A I believe he was.

Q Do you recall any conversations with him at that time?

A No specific conversation that evening. I had, frankly, many conversations with Mr. Silverman during the December period.

Q From December forward or backward?

A No, from December through this -- about December 10 or 13 -- sometime in mid-December until the closing -- concerning his clients and I guess some of these discussions may have been after that December 30 meeting but Mr. Silverman and I had gone to MIT together. We were not good personal friends but felt somewhat of a camaraderie that I didn't necessarily feel with some of the other attorneys.

Q Do you recall any specific conversations with Mr. Silverman with regard to his clients?

A I do remember Mr. Silverman telling me, and this frankly was as late as early February, that he was going to recommend to his clients to sign the agreement and that he felt it was in their best interests.

Q Excluding for the moment the meetings of January 15, 1971, February 5, February 8, February 11, can you describe in general your activities from January 1, 1971 until February 11, 1971 in connection with this transaction?

A Well, they were similar to the ones I outlined during the November-December period but they took on a greater burden. Eventhough the December 31 agreement may not have been a legal binding obligation Mr. Risher and I both realized that any operational profits and losses that occurred after that period were going to really accrue to the successor corporation, and so we became very much involved from that day forward with all of the operations and factors and things the firm was involved in.

On top of that, of course, there were continued negotiations with various people including with Mr. Gross, primarily through his attorney. There were numerous meetings with the New York Stock Exchange. Some time during this period Mr. Risher and I were informed that we were going to have to take a New York Stock Exchange member's examination and we actually ended up during this period having to go to school, classes on afternoons and weekends and some evenings and weekends to study for an allied members' exam which we took prior to the February 11 date.

Q Did you attend the meeting at Mr. Mandel's office on January 15, 1971?

A Yes, I did.

Q Who was present?

A Mr. Mandel, Mr. Gross, Mr. Persky, Mr. Risher and myself.

Q Describe what took place at that meeting.

A The original purpose of the meeting was to review the present financial position of the firm as of that date, and then hopefully to see if an agreement or a settlement could be reached with Mr. Gross so that he would be a party to the agreement. It became apparent very quickly into the meeting that Mr. Gross and Mr. Mandel were not interested in the financial picture of the firm, but only that they felt that Mr. Gross was entitled to a position that we disagreed with in terms of a senior claim and receipt of some form of cash payments for his capital position.

Q Perhaps I have jumped the gun because you have talked about -- before January 15, 1971, had there been discussions with regard to Mr. Gross?

A There had been -- Mr. Gross' name had come up at many times at the meetings with the limited partners. Mr. Richenthal, Mr. Steefel to a somewhat lesser extent, Mr. Abrams I believe, Dr. Philip Shulman, who was one of the limited partners, had often, on practically every occasion when the financial circumstances of Neuburger, Loeb were brought up, had commented that they felt -- personally believed that Mr. Gross was in some way responsible to them for the losses that had occurred, because he had been the managing partner during the time when these losses were realized and one or two occasions I believe Mr. Shulman even stated that they felt it was wrong for him to have resigned when he did.

So there were numerous statements by those people that they felt that Mr. Gross was certainly not entitled to any superior claim, ie, receive cash or something like that, and that they felt that he in some way or other was responsible to them for some of the financial losses that the firm had incurred, and that as a result they felt had, you know, encroached upon their capital positions.

Q Did you personally have a position with regard to what the limited partners and various people you described had stated?

A Only indirectly. The only areas that I had any first-hand knowledge of were the basketball people, and some of the operating problems and conditions of the firm.

The loans that had been taken out for the basketball team, which had not been reported to the Exchange, were in my opinion illegal as far as the Exchange was concerned. I don't know what the financial implications might have been but as far as I had seen, it had never been reported as an obligation of the partnership.

I had no knowledge of any of the other specific matters first-hand. Some of them were mentioned as names to me but I had no first-hand knowledge of them.

Q What I am asking is, did you express any opinion with regard to any of these things?

A No, sir.

Q Did you also attend meetings on February 5 and February 8, 1971 at Golenbock & Barell?

A I remember at least one meeting in that period to discuss once again a settlement with Mr. Gross. I do not have my own recollection now that it was at Golenbock & Barell. I assume it is the same meeting that has been testified to by other people here but I do recollect an early February settlement discussion at which Mr. Mandel was present.

Q Do you recall what took place at this meeting?

A The only specific thing I recall was at one point in time during these discussions I felt a sigh of relief because I thought we had reached a settlement, and if I remember correctly, it was a settlement that was agreeable to the attorneys for the limited partners, who were the ones that were most vocal in their statements of not reaching any settlement with Mr. Gross. There was one that certainly was satisfactory to the corporation, frankly, the new corporation would have agreed to -- I don't want to say any settlement but we had very little to gain or lose by the relative amounts of the settlement that were being discussed vis a vis Mr. Gross, and if I remember correctly, and I hope I am not misstating what Mr. Mandel said, I think Mr. Mandel stated that he would recommend acceptance of the settlement to his clients. That is the best of my recollection. And I thought we had in fact overcome the impass when -- I don't know if Mr. Mandel left the room or he discussed it with Mr. Gross, and if I remember correctly, for reasons that I just don't recall now, the settlement that I thought might be accepted was turned down by Mr. Gross.

Q Mr. Gross was not at the meeting?

A I am sorry, I don't remember.

Q Do you recall Mr. Mandel leaving the meeting to make a telephone call?

A I don't recall if he had to get on the phone or he took Mr. Gross aside but as best I recollect there had been reason to believe we were close to a settlement, and it just didn't occur.

Q Mr. Muh, what if anything did you know about the Buckley matter and its settlement before December 31, 1970?

A Until I came to this courtroom this past couple of weeks, I knew absolutely nothing about the Buckley matter other than it was one of 15 or 20 lawsuits that Neuburger, Loeb & Co. had been involved in, and that one way or another it had been transferred to the corporation.

Q Did you know of or authorize the preparation of Defendants' Exhibit X, the draft complaint that's been --

A I am sorry I don't know what document.

Q I can show it to you.

THE COURT: Right here.

(Document handed to the witness.)

Q -- at or about the time that it was prepared?

A I am sorry, when was it prepared?

Q I think it is dated in February, 1971.

A I have never seen this document. The only thing I am aware of is that sometime in February, I believe it was either Mr. Risher or Mr. Berkowitz commented to me that there was a potential asset of the corporation and that the corporation was going to initiate a claim on that which involved Buckley and an assignment from Buckley against Mr. Gross, and I said, "That sounds like a very logical thing to do, let's do it," and I don't ever remember seeing any documents having any discussion on the Buckley matter, in fact, I frankly don't know what the whole thing was about at that point in time.

Q Do you recall when your conversation with either Mr. Berkowitz or -- I didn't catch the other --

A Mr. Risher.

Q -- or Mr. Risher took place.

A It was obviously prior to the filing and that date would refresh my memory.

Q Was it before or after the closing of February 11?

A I don't relate the two. I don't recall. I am sorry.

Q Was it ever your intention to in any way use the Buckley claim to avoid having the corporation pay the defendants in this case?

A No, sir.

Q Mr. Muh, did there come a time when you became aware of a lawsuit in California between Messrs. Kayne and Sloane against Mr. Gross?

A Yes.

Q Do you recall when you learned of that?

A I believe it was sometime in January of 1971. I was in very frequent communications with Mr. Kayne, as you might imagine, at this point in time. Spoke to him several times a week; and I believe in just the course of conversation he mentioned to me that, you know, "By the way Chuck and I are going to bring our action against Mr. Gross."

Q What did you say when he told you that?

A It really had no direct concern to me. Fred informed me of it as I think he might any matter between two people who had been close friends for 15 years.

Q Did you in any way in your mind believe that it would affect Mr. Gross' participation in the transaction?

A No, if anything I would think it would do the opposite. It would get him more antagonistic. I didn't associate that with the corporation in any way. This went back to matters, as I understood it, that had to do a year before with Mr. Kayne and Mr. Sloane's original investment in the partnership and had nothing to do with the corporation, as best I know.

Q Did you give Mr. Kayne or Mr. Sloane any encouragement?

A No. Neither encouragement nor discouragement.

Q Did there come a time when you became aware of any correspondence between Neuburger, Loeb and Rafkind & Co. with regard to Mr. Gross?

A Yes. And again I am not clear on the dates. I remember Mr. Berkowitz' office was near mine and again I saw Mr. Berkowitz daily, and I recall on one occasion Mr. Berkowitz showing me two letters. One I believe from Rafkind & Co., requesting customary clearance, and a second was a reply letter. I guess the first letter was directed to Bob Neuburger and Mr. Berkowitz had drafted a reply. He showed me the letter. I don't recall if he had mailed it or not at that time; but I do remember that he showed me the letter, and the only thing I recall asking him is, is the letter accurate? And he responded, yes, it was.

And he didn't ask for my permission or authorization but he did show me those two pieces of correspondence.

Q Was it in any way your purpose or your state of mind that that letter be used to harm Mr. Gross?

A Not in any way.

Q Did you attend the closing on February 11, 1971?

A Yes, I did.

Q What did you do at the closing if you will just give us a general description?

A Well, it was an unusual meeting in that it was somewhat disorganized, and I don't mean that in any sense that things weren't being accomplished but there were numerous meetings going on, there were people in two's and three's getting together. There were voluminous documents to be signed, to be collated, agreements to be exchanged; and so there was just all types of activity going on in different locations. The center of it was, of course I think, the library or conference room of Finley, Kumble and that is where most of the activity took place but there were quite often side get-togethers and side myetings to get other documents arranged and signed and so forth; and I spent the majority of the time really just signing documents and quickly, you know, looking them over once again, and trying to get everything expedited as quickly as possible.

THE COURT: Mr. Glatzer, you are going to be some time yet, I assume?

MR. GLATZER: Probably no more than ten minutes.

THE COURT: Do you want to go on until 5, is that your thought and then we will recess for the day?

MR. GLATZER: That will be fine with me.

THE COURT: All right, go ahead.

Q At or during the closing did you become aware of any problem with respect to an opinion letter?

A Yes. At some point during the closing proceedings, Mr. Burak of the Rosenman firm stated that he would not issue the opinion letter that had been expected of him.

Q Did you hear him say that?

A Yes, I don't know his exact words but it was to that effect. I believe it was in the library or conference room when he made that statement.

Q Before February 11 and before you attended the closing, were you aware of any problems at all with regard to the opinion letter?

A No, sir, I was not.

Q What happened after Mr. Burak made his statement?

A Well, as you might imagine, I think there were 15 attorneys present, and as a result there were about 15 conversations started all at once, of which frankly the implications of what he had said did not dawn on me at that point in time because to me this was a procedural matter and with 15 other law firms approximately in the room, I felt certain somebody would be able to issue such a letter.

I guess it was an hour later the Finley, Kumble firm did pass an opinion letter around the room for all of the attorneys present to review, and that letter was used for the closing.

Q All right. Do you know how it came to pass that the Finley, Kumble firm prepared the opinion letter?

A No, I could make an assumption but I personally did not know. I assume that --

THE COURT: Do not assume.

Q No, don't.

THE COURT: Go ahead.

Q Did you have any discussions with Mr. Persky or Mr. Bamberger during the myeting with regard to the opinion letter?

A Not with Mr. Bamberger. I may have asked Mr. Persky -- I am really now reaching in my imagination -- you know, into my memory.

Q Not your imagination.

A Because logically I think I would have turned to either Berkowitz or Persky and said, "Okay, you know what happens now?" I don't recall any specific conversation. I just know intuitively I would have done that. But I do not recollect any specific conversation as a result. I do remember that an opinion letter was issued an hour or so later or some time period later.

Q Did you personally have an opinion as to whether that letter was valid?

A Oh, definitely.

Q Or as to whether the transaction itself was valid?

A The fact that Mr. Burak --

Q Wait.

A Well, yes, I did.

Q What were the reasons?

A Any concern that might have been in my mind was totally dismissed when Mr. Burak, who had not issued the letter, allowed his clients to sign the letter. As far as I was concerned, that was by itself probably sufficient reason, logical reason, maybe not legal reason, for me to say whatever his reasons, motivations were for not issuing it, they couldn't have been very great. Obviously the fact that the Finley, Kumble firm issued a letter was very important to me, because it was a firm that I respected, and Bob Persky was an individual that I had respected and they issued the letter.

It was further in effect guaranteed in my mind it was no problem when none of the other attorneys in the room, all of whom read this document, all of whom either were present or were in the same set of offices when Mr. Burak made his statement, all of whom accepted the new opinion letter, all of whom either signed or allowed their clients to sign, and then frankly, the fact that the New York

Stock Exchange, the American Stock Exchange, all saw the agreements, had it to review for a period of 40 days, never commented; the fact that there had been a statement by Burak that he would not issue it, it was issued by somebody else, at that point in time and until this entire proceeding came about was so inconsequential that it meant absolutely nothing to me. It was strictly a procedural matter.

Q Was there any other reason relating to Mr. Mandel and Mr. Gross?

A No, sir. Well, you say relatingto them.

Q Relating to that statement.

A At the January 15 meeting that I referred to earlier, I believe Mr. Mandel stated that he would get an injunction against the closing, and that had been of great concern to me and the fact that we closed and he didn't seek an injunction again further alleviated any concerns in my mind that there was anything illegal about the transaction.

MR. GLATZER: Your Honor, I do have one other area that may take a few minutes, so I don't know if I should --

THE COURT: Why don't we recess for the night. 10 o'clock in the morning.

(Adjourned to Wednesday, July 23, 1975, at 10:00 o'clock, a.m.)

complaint. Now, a civil complaint is a pleading alleging a cause of action and certain grounds for relief.

MR. GRUTMAN: I have not seen the document, the information comes to me from other sources in my firm but I am told that it was a public matter open and notorious in November of 1971, which preceded Finley, Kumble being brought into the case by several months.

THE COURT: I will await --

MR. GRUTMAN: It was the Galanos-Yamada investigation, your Honor, and it was also the subject of an article in New York Magazine at about that time. These are matters that we can all take recognition of involving Richardson Dilworth and Evans and many people who were swindled in this Takara Partners-Galanos-Yamada matter. I think we can also take notice of the fact that many attorneys in New York City represented people called before the SEC in that matter

THE COURT: We can take such notice, including the Court.

MR. SHAW: The Court as well as myself at the time and I remember this vividly.

ROBERT MUH, resumed.

DIRECT EXAMINATION CONTINUED

BY MR. GLATZER:

Q Mr. Muh, during February, 1971, did you have meetings with the New York Stock Exchange?

A Yes, there were numerous meetings, probably an average of once or twice a week with both the New York and the American Stock Exchange.

Q Did there come a time during February, 1971, when you were advised by the New York Stock Exchange that they were compiling any report based upon the transactions that were carried at Neuburger, Loeb?

A Yes, Mr. Dilger of the staff of the Exchange informed me that he had to prepare a summary report to the Admissions Committee of the New York Stock Exchange concerning this transfer, proposed transfer, so that it could be used as one of the major in-puts to the Admissions Committee for their vote, which I believe was on February 10, as to whether or not the new corporation would be admitted as a member of the New York and American Stock Exchange.

Q Do you of your own knowledge, know the source of the information that was to be contained in that report that Mr. Dilger referred to?

A Yes, a substantial portion of that information was provided by Mr. Risher and myself, since we were the principal individuals that were in New York with the new corporation and we readily provided him with whatever information and answered whatever questions we could; so we provided, I suppose, most of the information and answered most of his questions.

Q Do you know when the report was prepared?

A I don't know the exact date of preparation. I know it had to be around that February 5 through 10 period.

Q Mr. Muh, I am going to show you a copy of a document which has previously been marked when Mr. Fitzgerald testified, as, I believe, Plaintiffs' Exhibit 104, and ask you if you have ever seen this document before.

A No, sir.

Q Would you look at it and tell me if you are familiar with the contents of the document?

A The vast majority of it, yes.

Q Is the information contained in the document the information that you gave to Mr. Dilger and Mr. Risher gave to Mr. Dilger?

A We gave him considerably more information, but a substantial portion of this is based on material that we and other people that we directed Mr. Dilger to in the partnership provided to him. Some of the financial information was provided by the controller's department of the partnership.

MR. GLATZER: Your Honor, I would like to offer this in evidence, although this is not the copy tha marked by Mr. Fitzgerald. It has been authenticated by Mr. Fitzgerald.

MR. MANDEL: Is there a copy of this already in evidence?

MR. GLATZER: No, it is not in evidence. It has been marked for identification. It was authenticated by Mr. Fitzgerald.

MR. MANDEL: There was an objection made.

MR. GLATZER: Made by you, I believe.

MR. MANDEL: Your Honor, I will adhere to that objection because the information contained in the document does not come from the Stock Exchange, which has no personal knowledge, but comes from Mr. Muh and Mr. Risher, admittedly, so that the information in the document is hearsay.

THE COURT: I will sustain it.

MR. GLATZER: I believe it is a document made in the regular course of business by the Stock Exchange.

THE COURT: No, I wouldn't so construe it. I will sustain the objection.

MR. SHAW: Your Honor, could I be heard just briefly? I offered this document originally and I think on the issue of whether or not there was a conspiracy, the fact that these two gentlemen went to the New York Stock Exchange, and made disclosure which I believe can be characterized as full, is relevant, not so much on the truth of what was said but on the fact that they made these representations to the Exchange, so I should suggest that it be received.

THE COURT: That can be competently proved through this witness' testimony and does not need an Exchange or hearsay instrument to prove it.

MR. SHAW: The document is very lengthy. That's the only point, your Honor.

THE COURT: I sustain the objection.

Q Mr. Muh, can you recall specifically the information with regard to the transaction that you gave to the Exchange?

A I am sorry, I don't understand.

Q Can you recall information that you gave to Mr. Dilger during February 19 --

MR. MANDEL: Your Honor, excuse me, we are all anxious to save time, and in the interests of saving time I will withdraw the objection and let the document come in.

THE COURT: It may be received.

MR. MANDEL: Will that save time?

MR. GLATZER: Yes, it will. I will remark it as an exhibit since we don't have the other one.

MR. MANDEL: It is up to you.

I think it would be fair to provide that this document does not prove the truth of what was stated therein but merely that Risher and Muh made the statements to the Stock Exchange.

THE COURT: It is the recollection of the author of the memorandum of what Risher and Muh said to him, among other things, I take it.

MR. GLATZER: That's correct, your Honor.

THE WITNESS: If I may, your Honor.

xx (Additional Defendant Kayne Exhibit L received in evidence.)

Q Mr. Muh, did you become a shareholder of Neuburge Loeb & Co., Inc.?

A Yes, I did.

Q On or about what date?

A February 11, 1971.

Q How many shares did you own as of that date?

A 200,000 shares which represented approximately 16 percent of the outstanding common stock, but a higher percentage, approximately 27 percent of the voting -- 27 to 30 percent of the voting common stock.

Q How much did you pay for the stock?

THE COURT: How much did you say?

THE WITNESS: About 27 percent.

A I paid the minimum investment allowed by the New York Stock Exchange which was $10,000.

Q Can you describe the circumstances under which that payment or that price was fixed?

A It was a legal requirement of the New York Stock Exchange. In order to be a principal of a member firm you must have a minimum investment of $10,000. The Exchange, through Mr. Dilger, had very strongly urged and requested that I invest substantially more, but could find absolutely no justification, and were able to convince him or at least we carried the day we would not have to invest more than the $10,000 which was the legal minimum.

Q At that time, did you have an opinion as to the value of the stock --

A Yes.

Q -- that you purchased. What was your opinion?

A From an accounting standpoint, I felt it was worthless; that there was substantial goodwill on our balance sheet, and that there was no net worth to the stock itself.

Q Did there come a time when you sold the stock?

A Yes.

Q What did you receive in payment for the stock?

A I received a total of $400,000, which was a combination of cash and notes.

Q You were here when Mr. Risher testified as to the circumstances under which the stock was sold; . correct?

A Yes, I was.

Q Did he accurately state those circumstances?

A Yes, he did.

Q When did Risher, Muh & Co., Inc. cease to be engaged by Neuburger, Loeb?

A Approximately February 1971.

Q During the time that Risher, Muh & Co., Inc. was engaged by Neuburger, Loeb, to whom were the payments made by Neuburger, Loeb?

A To our corporation. Our firm had been retained, the monthly fee was paid to our corporation, and strictly to our corporation.

Q Was any remuneration at all received by either you or Mr. Risher directly from the partnership or indirectly from the partnership during that period?

A Not to the best of my recollection. It may have been some expenses like my trips to Buffalo that they paid but I don't remember any direct consulting fees being paid individually.

Q Or salary or anything of that sort?

A No, we were never employed employees or partners of the partnership.

MR. GLATZER: I have no further questions, your Hor

CROSS EXAMINATION

BY MR. GRUTMAN:

Q Mr. Muh, you have testified concerning your presence at various discussions that were had between December and the transfer agreements' closing on February 11, 1972, is that correct?

A Correct, yes.

Q Do you recollect during those discussions any mention having been made of the attitude of the limited and general partners concerning Charles Gross?

A Yes. There were several meetings of him.

MR. GRUTMAN: I am reading from the Muh deposition, Mr. Mandel.

MR. MANDEL: No, I don't believe you are allowed to do that.

MR. GRUTMAN: All right; very well.

MR. MANDEL: They are not adversaries.

Q Mr. Muh, do you recollect what the discussion was when you were at the offices of Stroock & Stroock & Lavan concerning Mr. Gross in October or November of 1970?

A I have a feeling that the date is wrong. I had numerous date errors in my original deposition in terms of months so I am not sure which particular meeting you are referring to. Could you be more precise?

Q All right. I am referring to a meeting which was held at the office of Stroock & Stroock & Lavan in 1970.

A Right.

Q Do you recollect what was said at that meeting concerning Charles Gross by the representatives of the limited partners?

A I don't recall a specific meeting. I do recall that the Messrs. Steefel and Richenthal stated on numerous occasions, and I am not identifying at any one session, that they felt that their clients had been financially harmed by Mr. Gross, and that he was not entitled to receive any cash payments or any other payments from the partnership as a result of merely because he had resigned.

Q Apart from the fact of his resignation, do you know any statement that was made concerning the connection between Mr. Gross's activities and the financial state of the firm at this meeting?

A They made many statements which, very honestly, they didn't give me factual backup, but they made many statements that indicated to me that they had reason to believe that he was responsible.

Q Do you recollect whether or not at that meet-there was any reference made to litigation on behalf of these people and the firm against Gross?

A Yes. Mr. Richenthal, and I believe it was either Mr. Abrams or Mr. Eisenberg both stated that their clients would probably sue Mr. Gross.

Q I believe you said that part of your experience had been with McKinsey & Company. Did you have as part of your work a familiarity with balance sheets, profit and loss statements, and other financial documents?

A Yes, I did.

Q During the course of the discussions that we are inquiring about at the present time, between November and February, do you recollect any mention having been made about tax refund that might be due to some of the partners by reason of the losses sustained by Newburger, Loeb?

A Yes. That came up on several occasions.

Q At that time, did you make any expression of what you believed the treatment of those tax refunds would be?

A I am not sure I understand the question. You say the treatment of the tax refunds.

Q Did you regard it as an asset of the firm?

A The tax refund itself? No, sir.

Q Very well.

A Not until we receive assignment.

Q Prior to December 30th of 1970, did you have any knowledge concerning the existence of something called the Buckley claim?

A As I believe I stated yesterday, I was familiar with the name and the fact that it was one of a long list of legal matters that Newburger, Loeb & Company was involved in, but I had no further knowledge of the matter.

Q From some time in November to the date of the transfer agreement, was the house counsel or inside counsel for Newburger, Loeb & Company Lawrence Berkowitz?

A Yes, I believe around December he became --

Q I think he testified that he came to work somewhere in the middle of November.

A November? Fine.

Q And after the transfer agreement, was Lawrence Berkowitz the inside or house counsel for the corporation?

A Yes,sir.

Q During the time that he was both house counsel for the partnership as well as house counsel for the corporation, did Mr. Berkowitz have authority to handle litigations and litigation matters on behalf of the firm?

A Absolutely.

Q You are not a lawyer or trained as a lawyer, is that correct?

A No, sir.

Q . Did you expect Mr. Berkowitz to represent the partnership when he was counsel for the partnership and the corporation when he was counsel for the corporation in matters tha- were litigated matters or relating to litigating matters?

A Yes, except as he felt that he should designate someone else to do so.

Q Lastly, I think you have said that Fred Kayne is someone who went to MIT with you and whose roommate you were, is that correct?

A We weren't roommates but we were good friends.

Q At some time or other, did you learn from Mr. Kayne whether or not he and Mr. Gross had had a dispute concerning Mr. Kayne's involvement as a partner in Newburger, Loeb?

A If by that question you mean concerning his becoming a partner, yes, I did.

Q That is correct. Did Mr. Kayne, prior to February 11, 1971, ever make mention to you of what he intended to do about that dispute?

A Yes, he discussed it with me probably on two or three different occasions prior to February.

Q What did Mr. Kayne tell you the subject of the dispute --

THE COURT: When did you discuss it?

THE WITNESS: The first occasion that I recall is probably in June of 1970.

THE COURT: All right.

Q Did Mr. Kayne ever tell you that he was going to sue Mr. Gross?

A He initially told me he was considering suing Mr. Gross, this was in June or July of 1970, because he felt that he had been wronged financially through his investment in the partnership, and he informed me some time just prior or about the time, I guess it was January of '71, that he was in fact following through on that course of action.

Q And that he was going to sue Mr. Gross over his inducement to come into the partnership?

A Yes.

THE COURT: Let's ask the witness, Mr. Grutman.

MR. GRUTMAN: All right, fine.

Q What was your understanding?

THE COURT: What were you told?

THE WITNESS: It was just a general discussion, and he merely said that there had been some representations made concerning the financial status of the partnership that he felt had been inaccurate, and in fact he said had been deliberately lied to.

Q By whom?

THE COURT: Did he say?

A By Mr. Gross, and that he felt he had therefore a legal remedy.

Q Insofar as your involvement in Newburger, Loeb & Co., Inc. did you ever encourage Mr. Kayne to sue Mr. Gross?

A No, sir.

Q On that?

A I did not.

Q So far as you know, did Mr. Kayne's disagreement or dispute with Mr. Gross concerning Mr. Kayne's inducement to come into the Newburger, Loeb & Company partnership have anything whatsoever to do with the transfer agreement?

A None whatsoever.

Q Did you ever ask Mr. Kayne to press that suit as a pressure point on Mr. Gross?

A No, Mr. Grutman.

Q Did you try to use that suit as a pressure point on Bleich and Donoghue?

A No, sir.

Q Did you have any connection or involvement directly or indirectly in the institution of that suit or its prosecution?

A None whatsoever.

Q Didyou contribute to the costs of that suit?

A No way.

Q Were you ever consulted about the bringing of the suit as to whether it should be brought or not?

A No, sir, and I never saw the documents related to it either.

THE COURT: Let me stop you just a moment.

MR. GRUTMAN: Surely.

THE COURT: You had a conversation with Mr. Kayne shortly before it was brought. Right?

THE WITNESS: To inform me --

THE COURT: What did he tell you and what did you say to him on that occasion?

THE WITNESS: It was something that was a matter of fact conversation. I spoke to Mr. Kayne quite regularly at that time, and he informed me that he and Mr. Sloane were going to attempt to get there, I believe it was $100,000, I am not sure of the dollar amount, back that it was obvious now they had lost their entire investment, and I guess until that point in time they didn't know if they had lost their entire investment, and it wouldn't have been utnil the transfer that they really would have realized that their entire partnership investment had been wiped out, and that they were going to bring some type of California lawsuit.

THE COURT: This is what you were told?

THE WITNESS: That's all I was told, yes, your Honor.

THE COURT: What did you say when youwere told that?

THE WITNESS: I genuinely don't recall even commenting on it because I did not associate it as anything that was of concern to me other than as a friend of Mr. Kayne's.

THE COURT: What did you say that occasioned Mr. Kayne saying this to you?

THE WITNESS: Your Honor, Mr. Kayne and I had been very close friends for 15, 16 years. We are now embarking on our first business venture together. It was just normal that this type of information would just come out in normal conversation.

THE COURT: Did he say "Oh, by the way, I am going to sue Charley Gross?"

THE WITNESS: Yes, sir, it was a very casual thing. I don't know why he specifically volunteered it. I didnot ask but he did volunteer it. I remember the conversation. I don't remember the details of howit came up.

THE COURT: All right, go ahead.

Q You just told his Honor that when Mr. Kayne casually mentioned this prospective or incipient lawsuit to you, it had no connection with you, is that correct?

A That is correct.

Q Did it have any connection with the transfer agreement?

A Not to my knowledge.

Q Or any problem concerning the transfer agreement?

A No.

THE COURT: He's testified as to what he knew.

Q How long did the discussion take when Mr. Kayne mentioned the fact that he or he and Sloane were either bringing or had brought this action against Gross?

A I really don't know. It was just a by the way, a couple of minutes, I really don't recall.

Q When he mentioned it to you did Mr. Kayne say that he was going to use that suit in any way in connection with the transfer agreement?

A No, he did not.

Q Or any problem connected with the transfer agreement?

A No, he did not.

Q When that incidental intelligence about the California case against Mr. Gross was communicated to you, did you mention it to anybody else?

A I don't know. I really don't remember. It was not a significant fact at the time.

Q Do you recall having reported it to Mr. Berkowitz?

A I might have, Mr. Grutman. I honestly don't recall if I told Mr. Berkowitz or Mr. Risher. I might have. I just cannot tell you.

Q Do you have a recollection that you discussed that suit with Mr. Persky?

A No, sir. No recollection whatsoever.

Q Or with Mr. Risher?

A It is possible, being in the office next to Mr. Risher that it came up. I do not have a recollection of such a meeting but I can't say it did not happen.

Q Other than the fact Mr. Kayne told you about this private and unrelated dispute that he had with Mr. Gross, did he ever mention it to you again before the transfer agreement was consummated?

A No, he did not.

Q And do you have a recollection of him discussing it with you after the transfer agreement was consummated?

A At various times, as things progressed, he told me that this happened or that happened. I remember he told me that I don't know what month but some time in May or June -- some time after the transfer he informed me that Mr. Gross had won a jurisdictional item on it, that they were going to all of a sudden have additional expenses and have to come to New York.

He kept me informed of decisions and things along the way, yes, but again just for information purposes.

Q And no other purpose, is that correct?

A That is correct.

Q Mr. Muh, did you and Mr. Risher, when you first were engaged as consultants for Newburger, Loeb, have it in your mind to steal the business?

A Mr. Grutman, I have never had it in my mind to steal anything.

Q And in the work that you did for the partnership, did you exert your best efforts on behalf of the partnership?

A Yes, sir.

Q Did you ever enter into a conspiracy with Mr. Risher or with anybody to deprive Charles Gross, Mabel Bleich or Jeanne Donoghue of theeir capital?

A No, sir.

Q Did you ever enter into a conspiracy to bring baseless litigation against Charles Gross and to tie him up in court for years and years?

A No, sir.

Q Did you ever tell Charels Gross that you were going to wear him down by economic attrition?

A No, sir.

MR. GRUTMAN: No further questions.

MR. SHAW: I just have one point.

CROSS EXAMINATION

BY MR. SHAW:

Q I just have one point. I believe that you terminated your employment by Newburger, Loeb some time in October of 1972, is that correct?

A I personally did?

Q Yes.

A Yes, that is correct.

Q Prior to that time you had been a registered representative of Newburger, Loeb in the California office, is that correct?

A For approximately six months prior to that date only, that is correct.

Q When did you leave New York City and go to work in California ?

A Approximately April or May of that year, '72.

Q April or May of 1972?

A Yes, sir.

Q That is shortly after the transaction involved in your sale of your stock in Newburger, Loeb, correct?

A That is correct.

Q When was the last time you had anything to do in a business context with Mr. Risher?

A That occasion, in other words, as an employee of the firm, from April to '72 I was in effect working for Mr. Risher but I have not had any business transactions or dealings with him since the sale of May stock.

Q Since October of 1972, have you had any business dealings with Newburger, Loeb whatsoever?

A None whatsoever.

Q Since October of 1972, have you had any lengthy conversations with Paul Risher?

A No, to the contrary.

Q Other than meeting Paul Risher --

THE COURT: What is to the contrary, you had no conversations or they were brief.

THE WITNESS: Mr. Risher has refused to meet with me on any occasion since then.

THE COURT: I see.

Q Other than meeting Mr.Risher since 1972?

A No, sir.

Q And at the present time, is there litigation on your behalf where you are the plaintiff and Mr. Risher is the defendant?

A Yes, sir.

Q And is that litigation presently pending?

A Yes, sir.

Q At the present time, is there litigation wherein you are the plaintiff against Newburger, Loeb Corporation?

A Yes, sir.

Q Is that litigation presently pending before the Ninth Circuit Court of Appeals?

A I am not positive of the identification but it is pending before some body.

Q and is it correct that at no time had you --

THE COURT: Just a minute now. Since the door has been opened here, I want to know what this litigation is about.

MR. SHAW: All right.

Q Does the litigation relate to the February 1972 employment agreement?

A Yes, it does.

Q And does it relate to the February 1972 stock purchase agreement?

A Yes, sir.

Q And is the action in New York on a note given in relation to the stock purchase agreement?

A Yes, it is.

Q And is the action in California in relation to a consulting free agreement given in relation to the transaction whereby you sold your stock in Newburger, Loeb to Mr. Risher and various other persons?

A Without characterizing the specific transactions, one suit is as a result of the note I received from Mr. Risher and two other gentlemen. The other suit is related to a consulting agreement that I entered into with the corporation before terminating my employment.

THE COURT: Mr. Muh, in a sentence or two you will probably do better than the lawyers. Tell me what you are complaining about.

THE WITNESS: I haven't been paid, your Honor.

THE COURT: You haven't been paid on the consulting agreement?

THE WITNESS: No, sir.

THE COURT: Good for you.

How about you haven't been paid on the notes either?

THE WITNESS: Partial payments have been made.

THE COURT: So you are suing for the balance of the notes and to get paid on the consulting fee?

THE WITNESS: Yes, sir.

MR. MANDEL: May I interrupt for a second? What's the defense?

MR. GRUTMAN: I don't think that's relevant.

MR. MANDEL: I will ask it.

MR. SHAW: He would be compromising his position.

THE COURT: Mr. Mandel can ask then.

THE WITNESS: They are not good, Mr. Mandel.

MR. SHAW: The fact that they are in the Court of Appeals says something.

Q Let me ask you this question, Mr. Muh: Is it correct that you have at no time sat down with Mr. Risher to discuss your testimony in this case?

A That is true.

THE COURT: Anyone else?

MR. SILFEN: I just wanted to ask: Is it a fact,Mr. Muh, that you did not testify at the arbitration on behalf of plaintiff company or Mr. Sloane?

THE WITNESS: That's true.

MR. SILFEN: No further questions.

CROSS EXAMINATION

BY MR. MANDEL:

Q What is Mr. Risher's defense to your action on the merits, Mr. Muh?

A I believe the principal defense is that there had not been proper approval on the sale of my stock to Mr. Risher by the Exchange, New York Stock Exchange.

Q What other defenses, economic duress?

A No, sir.

Q He didn't say that he didn't buy under his free will?

A I don't believe that was a legal defense cited.

Q Did he say that you had misinformed him in any way about the transaction?

A There were some statements that there was some information concerning the California office that was not readily available to him.

Q That you had withheld from him?

A I genuinely don't remember if that was the statement or not. I believe the principal defense was the lack of approval by the appropriate regulatory body.

Q At least that's the one which got to the Court of Appeals?

MR.SHAW: That is an unfair question, your Honor.

A I am not an attorney, Mr. Mandel, but I believe --

MR. SHAW: I am in that litigation and --

THE COURT: It is withdrawn.

MR. SHAW: There is a legal issue there, not a factual issue.

Q I think that you testified yesterday on direct that after the December agreement you knew you were running the business for the benefit of the corporation, because the corporation would be absorbing losses or getting profits from then on if the deal went through, is that right?

A That is correct, sir.

Q And even before the December 30th agreement, you and Mr. Risher were running the business, weren't you?

A The statement "running the business" is I think a bit of an overstatement. There is no question that we had a very signfiicant in-put, but without exception, any decisions of any economic import were discussed with members of the Executive Committee of the partnership, and they were the ones who, upon agreeing with them or disagreeing and changing them and compromising would make the actual decision. We had no legal basis for being able to take actions for the partnership, but you are right in saying that we had a very significant in-put from really November--December period up.

Q In your deposition on page 70 and 71, I don't really want to read it word for word.

MR. GRUTMAN: Just a moment, please, Mr. Mandel.

Q Do you remember that one question I asked, page 71 --

MR. GRUTMAN: Just a moment.

Q -- 71, line 3.

MR. GLATZER: Your Honor, I have a copy for you.

THE COURT: It probably will save time. I should have one here.

(Document handed to the Court.)

Q I am just getting to the guts of the matter. I am asking just one question and answer or two questions and answers. I said:

"In any practical way you were managing" and you answered "Except, as I say, we had no legal right to commit for the partnership and obviously didn't."

And I said "And you were simultaneously negotiating the deal, the details of the takeover," and the answer is "That is correct", those were accurate answers you gave, is that right?

A Yes, sir, they are.

Q And whatever managerial powers you had, as a practical matter, before December, increased or intensified after December because you felt you were operating the business for the account of your corporation at this time, is that right?

A After December, definitely, yes, sir.

Q All right.

Now, you have just testified, I think in response to Mr. Grutman, about the book value of the stock you were buying and you wanted to buy it for less.

I think I probably heard Mr. Risher testify along the same lines, but I ask you, Mr. Muh, isn't it true that, regardless of the book value ofthe stock, you recognized this deal as one where there was an enormous potential for profit for you on the upside?

A If I had not felt that there was economic potential, economic profit, Mr. Mandel, I probably wouldn't have done it.

Q And the reason why there was such a large potential for profit is partly leverage, you had only put in $10,000, but if you could turn the business around, you would own 20 percent of the business which had 5, 8, something millions of dollars invested in it?

A That's very accurate.

Q And as an experienced or at least a trained business person, you knew what that could mean?

A If we could be successful in making the firm economically viable, I fully understand it could mean a significant personal reward.

Q And on the down side, the most you could lose was $10,000, and you would be getting a pretty good salary for your work, right?

A That's two questions, sir, and I disagree with the beginning portion. The most important thing I felt I had at risk wasn't the $10,000 but was professional reputation. I had been and am today an consultant and someone who has to go out and solicit business from corporations and professional people in the community; and the $10,000 was really minor compared to what I felt could be the risk professionally to my career, but I guess we had enough ego at the time, maybe somewhat naive, to feel that we would be capable of turning it around.

Q The point is you would not have risked your reputation if you didn't think there were very good chances that you would succed?

A That is correct.

Q And by succeeding, you would enhance your reputation and make large sums of money?

A Yes, sir.

Q Those facts, I guess you will agree with me, provided a very strong incentive on your part to want the deal to go through?

A Yes, sir.

Q If this deal had collapsed, you would lose an opportunity to make a tremendous amount of money, and an opportunity to enhance your professional reputation.

A Well, if the deal had not gone through I would have been in the same position that I had been prior to it but, yes, I did view this as a significant personal opportunity.

I cannot disagree with that.

Q You were in effect running the business in December when the Buckley matter was settled?

A Along with Mr. Risher.

Q Mr. Risher?

A Yes, sir.

Q And Mr. Risher was associated with you throughout December in your effort to buy the business?

A Yes, sir.

Q So was Mr. Kayne througnout December?

MR. GRUTMAN: When, throughout?

Q Throughout December.

A I don't believe it was the entire month, no, sir.

It was a significant period but I don't believe it was the entire month.

Q You remember the submission to the Stock Exchange, December 17th?

A Yes, sir.

Q Which has been put into evidence here which had attached to it Mr.Risher's handwritten notes of who is getting what, and Kayne was in there for the same as you and --

A I think I do, yes. Your statement is correct. I don't remember the document. The statement is correct.

Q So at least by December 17th Kayne was already in there fully with you and Mr. Risher?

A That is correct.

Q You were associated in that effort, and you were represented in that effort by Mr. Persky; is that right?

A I am sorry, I don't follow. In which effort are you referring to?

Q The effort to buy the business or to make the transfer agreement go through.

A The firm of Finley, Kumble were the corporation's counsel, yes, sir.

Q But there was no corporation until the end of December?

A I am sorry, the contemplated corporation.

Q So Finley, Kumble represented you and Mr. Kayne and Mr. Risher and the other people who were going to form the corporation, because Finley, Kumble did represent somebody in the negotiations, right, in December?

A Yes, to me it was always the corporation even though you are pointing out that legally it hadn't been formed but you are correct.

Q And in the course of your work you met with Persky from time to time?

A Yes, sir.

Q And you attended meetings with him?

A Yes, sir.

Q And you said I think at one point that over some months there were hundreds of meetings between you and Risher and Persky and representatives of the various factions who would be involved in this deal?

A Yes, sir.

Q And at least beginning in December at these meetings Persky was representing the future incorporators, right?

A Yes, sir.

Q You are aware, are you not, that the Buckley matter was settled by Persky, the papers were signed towards the end of December?

MR.GRUTMAN: No, December 17th.

MR. MANDEL: No.

MR. GRUTMAN: The lease is dated December 17th. Closing statement is December 17th.

MR. SHAW: The memorandum from Berkowitz is the 9th, I believe.

MR. MANDEL: I believe that the papers were signed on December 30th, or exchanged. We'll --

THE COURT: This need not be on the record, all of this back and forth here.

MR. MANDEL: Mr. Rothman is looking for copies, and we will bring that out in a moment.

Q You have heard that Mr. Risher was consulted about the Buckley settlement, in testimony in this courtroom, have you not?

A Just here, yes, sir.

MR. MANDEL: Your Honor, I would just like to put a few facts on record here, recite them to the witness.

THE COURT: As a frame of reference to him, is that it?

MR. MANDEL: It has to do with the Buckley settlement, and it may refresh his recollection. The note of Mr. Buckley is dated December 30, 1970.

MR. SHAW: Will you refer to exhibits by number, please?

MR. MANDEL: P-47, the note of Mr. Buckley, is dated December 30, 1970. The general release signed by Leo Stern as a partner is dated December 24th.

MR. SHAW: What exhibit?

MR. MANDEL: That's P-48, page 3.

For the present moment rather than waste time and search further I will leave it at that.

Q What I am saying to you is you had a division of work with Mr. Risher, is that right?

A Yes, not a formal delineated one but clearly there was so much to be done that we didn't -- did our best not to overlap our activities.

Q And as far as you are concerned, Risher's handling of the Buckley matter was within his authority?

A Or Mr. Berkowitz's handling, yes, sir.

Q And Berkowitz was also a member of your purchasing group, at least afterDecember 17th, right?

A As a minority shareholder, yes, sir.

Q And his name also appears on that letter to the Exchange, and he was also working for the partnership during December subject to your instructions and control and those of Mr. Risher and ultimately of the partners, right?

A Not subject to our control but certainly to our influence, yes, sir.

Q and he did bring things to you for approval and expressions of opinion during that period?

A We had made it very clear to not only Mr. Berkowitz but to all the general partners that we really insisted on being informed of whatever they did, so, yes, he would just normally have shown any of these types of things to either Mr. Risher or myself.

Q All right. On December 30th a preliminary agreement was signed, and in that agreement do you recall that no provision at all was made for any kind of payment to Mr. Gross?

A I remember that subject coming up. I don't recall whether that was in fact in the December 30th agreement or not. I remember the subject being raised by Mr. Richenthal, that the limited partners felt that Mr. Gross should not get anything.

Q And you went along with that on the December 30th agreement and so did Risher andso did Kayne, right?

A Yes, sir.

Q And later there came a time when a lawyer for Mr. Gross appeared on the scene named Mandel, is that right?

A Yes, sir.

Q And things changed at least a little bit?

A Yes, sir.

Q Is that right? You recall that somehow or other, you came to a meeting on January 15th bringing with you or coming with Mr. Persky and Mr.Risher, and you met at

Mr. Mandel's office with Mr. Gross?

A Yes, sir.

Q Do you recall whose suggestion that was?

A No, sir, I am afraid I don't.

Q At least by that time you wanted Mr. Gross to come along and consent in some way?

A Oh, yes.

Q To the proposed deal?

A Yes,sir.

Q What happened between December 30th and January 15th to change your attiude towards Gross?

A Sir, my attitude never changed. At the earlier meetings, I must admit I acquiesced to the wishes and statements of the limited partners. I had had very minimal personal dealings with Mr. Gross and I personally having not been a partner hadn't lost any money in the partnership, as far as I was concerned Mr. Gross should have been treated as a general partner along with all the other general partners in the transaction; but I felt that there was something that was out of my jurisdiction, that if there was a dispute among the members of the partnership, it was something I did not want to get involved with, and if the members of the partnership said that they did not want to include Mr. Gross, I must admit I just acquiesced and went along. There was no question in my mind that I would have preferred to have had no loose ends from a business standpoint, and to prevent any future problems down the road.

Q Well, Mr. Muh, what happened between December 30th, when the deal was going to be done without Gross, and January 15th, when you came to Mr. Mandel's office with your attorney Persky, and your colleague Risher, and you tried to work out a deal with Gross? Maybe you don't remember.

A I don't know if you are referring to something specific, sir. I don't recall.

Q You don't recall what change occurred?

A No, sir.

Q You do recall, do you not, that at the meeting in Mr. Mandel's office, there was discussion about claims against Mr. Gross?

A I believe there were, yes, sir.

Q You are pretty sure of that, aren't you?

A Yes.

Q And one of the claims that was mentioned, specific claims were mentioned and discussed, right?

A Yes, sir.

Q And Mr. Mandel said in effect they were hogwash, we count them for nothing, right?

A I believe you did, yes, sir.

Q Which you either accepted or didn't accept, right?

A Correct.

Q One of the claims that was discussed was the Buckley claim, right?

A Mr. Mandel, I don't recall specific discussion of the claims other than they were mentioned. There was just Buckley claim was mentioned, I believe a city investigating claim was mentioned. I had no more knowledge of what city investigating claim was than I did of the Buckley matter. They were mentioned.

They had specifici meaning to Mr. Gross. I can only repeat.

Q Who mentioned them? It wasn't Mr. Gross who mentioned --

MR. GRUTMAN: Let the witness finish.

MR. SHAW: The witness has been cutoff twice in a row, your Honor.

MR. MANDEL: I apologize.

A The whole discussion at your meeting was an attempt to see if there could be a meeting of the minds, and it was brought out that Mr. Gross had some what he said were claims against the partnership and I believe it was Mr. Persky said "Well, members of the partnership have stated to us that there are claims against Mr. Gross" and it was probably Mr. Persky who mentioned the city and the Buckley and any of the other matters, and I genuinely don't recall what they were.

Q Were you interested at the time?

A Mr. Mandel, I genuinely was interested only as it affected the corporation. I didn't feel that there was anything concerning disputes among the partners that would end up coming back to haunt me.

Q In the end, you knew the corporation was going to assume the liabilities of the partnership?

A Substantially all the liabilitieis, not all, right.

Q Yes.

And if there were liabilities to Gross, the partnership might have to pay them, right?

MR. GRUTMAN: The corporation.

Q I mean the corporation might have to pay them?

A If in fact there were valid claims, yes, sir..

Q And you were aware that at least on the books of the corporation there were substantial sums of capital shown for Gross and Bleich and Donoghue?

A Yes, sir.

Q In January, the latest figures you had, I suppose showed Gross at about $256,000, is that right?

A No, sir, I thought the figure was only in the 150 range. I may be wrong. That's the number that I remember.

Q All right.

But between Gross and Bleich and Donoghue, even at that number, we are talking about $300,000.

A Yes, sir.

Q Which is a very significant figure.

A Based on the books, yes, sir.

Q And you understood that if there were no offsets, that some might have to be paid by the corporation?

A Yes, sir. But I mustpoint out that whatever the legal or valid economic claims were, the New York Stock Exchange at their insistence caused the corporation to carry those liabilities on the balance sheet.

As a result, that money was not in effect capital of the firm.

Q Except you had the money?

A Well, we had the use of the cash but what I am saying is there would have been no impact on the corporation if, other than a cash item, there would have been no --

from an operating standpoint, and it was very important to me, that whether they received payments in an agreement with the partnership or not would not have affected our ability to form the corporation and operate as a firm. I therefore had a fairly great incentive to want to have a settlement and have this done were so as not to burden the corporation with what turned out to be substantially greater burden than I ever anticipated, but there was no real incentive on my part to quote -- you know -- not pay out was"due to them" whatever that might be.

Q Well, the New York Stock Exchange required you to carry the -- required the corporation to carry a reserve of $300,000?

A I believe that's the number, yes, sir.

Q But it did not require you to pay?

A That is correct.

Q So for the New York Stock Exchange capital reporting purposes, your capital was dimished by $300,000?

A Yes, sir.

Q But for operating purposes, you had the use of the money?

A That is if in fact there was actual money there. Remember, there was a deficit net worth of $800,000, but you are correct.

Q You had $300,000 more than if you had paid the money out?

MR. SHAW: Objection.

MR. MANDEL: No, that's --

A If we had written a check from the corporation for $300,000, clearly we'd have had that much less cash but we would not have had a change in the capital ratios and so forth as far as the exchange was concerned.

Q But there would have been a significant diminution if the value of the corporation, at least of $300,000?

A Yes, sir.

Q Yes. And you were aware of that?

A Yes, sir.

Q And you knew that the only thing that might keep you from having to pay that out right away were these claims and offsets; at least, that's the way it sounded from what Persky was saying, is that right?

A No, sir, that was not the only thing. In my mind -- you must remember -- Charles Gross --

THE COURT: Let's just stick with the question, Mr. Muh, so that we go along in a more orderly fashion.

A I did not accept that $300,000 figure as being an actual valid number; so therefore it wasn't in my mind a question of needing offsets to come up with what if anything might be owed to these individuals.

It was a very confusing matter. Mr. Gross wasnot the center of the universe at that point in time. He genuinely wasn't. He appears that way now and I don't want to harm Mr. Gross' ego in any way but that was just one incident during a very complicated, involved transaction. I was as much involved with half a dozen other matters as I was with Mr. Gross, and so I didn't put that at the center of my universe and say "What are the implications and effects of Mr. Gross and his posiiton on everything else?"

I look back on it now somewhat differently.

Q All right.

At any rate you heard Mr. Persky talk about the Buckley matter and other counterclaims, and you did not disavow what he said?

A That is correct.

Q And the import of what he said is if you don't go along with the deal we 've gotthese other claims that will keep you from getting your money.

MR. GRUTMAN: Objection.

MR. SHAW: Who was this said to?

THE COURT: Overruled.

MR. GRUTMAN: The import. He is paraphrasing that godfather business, Judge.

THE COURT: Either that is not, it is or isn't.

MR. GRUTMAN: All right.

A It had been stated I believe by Mr. Persky and had been stated to him in my presence by other people that there were several offsets to whatever capital positions there were, that would diminish whatever payments might be owed to Mr.Gross, yes, that is correct.

Q And that was said at the meeting to Mr. Gross and Mr. Mandel?

A I believe it was, yes, sir.

Q Is it also fair to say that Persky said that if we don't make a deal, you will have litigation about these matters?

A Mr. Mandel, I genuinely don't recall who brought up the subject of litigation first. It was discussed by both you and Mr. Persky, but the subject of possible litigation did certainly get mentioned and I don't recall who first mentioned it.

THE COURT: If no deal.

THE WITNESS: If no deal, yes, sir.

Q Did you have a conversation with Persky and

Risher when you left my office?

A I don't recall a specific one. I am sure we discussed. The thing that stuck in my mind from that meeting was the term that you, I believe, had mentioned about a possible injunction, and I was concerned and I do recall leaving, asking Mr. Persky whether in fact such a device was available; and I think he told me yes, it was.

That's the only specific conversation I recall.

Q In connection with that, the injunction came up, I take it, because I said that the transaction could not be carried out without the signatures of Gross and Bleich and Donoghue, is that right?

A Yes,you did. You made that statement.

Q And there was some talk about an injunction in connection with that?

A Yes, sir.

Q Do you recall that Persky said he didn't agree with me?

A Yes, sir.

Q He said the transactions could be carried out without their signatures?

A Yes, he did.

Q Did you have a talk with him about whether his opinion was right when you left my office?

A Not at that point in time, no, sir. Obviously, I felt he wasn't lying to you, we did discuss whether or not you could or there was any validity to your position: and I don't remember a specific discussion but it was Mr. Persky's opinion that the transaction you know was a legal one.

Q Did he say I might be able to get an injunction based on the claim that I had made?

A He indicated that there was a possibility that you could get an injunction. We didn't discuss on what basis but he did say that there was a possibility.

Q Is it true that you and Persky and Risher went downstairs on the elevator after leaving my office and right from the lobby of my building called Kayne and Sloane?

A No, sir. I have no recollection of that.

Q Would it refresh your recollection if I told you that's what Mr. Persky testified here?

MR. GRUTMAN: Mr. Persky said he made a telephone call, not that Mr. Muh was a part of it.

THE COURT: All right.

A I am sorry, I don't remember where I went after the meeting in your office, sir, and I do not remember calling Mr. Kayne as a result of that meeting.

Q Or Sloane?

A Or Mr. Sloane, no, sir.

Q You have no recollection one way or the other about that?

A No, sir. and I did not hear Mr. Persky's testimony so I -- if it's in disagreement, I can only say what I remember.

Q You don't remember.

THE COURT: Mr. Mandel, before you get beyond here, a point that perhaps has escaped me up to something that happened here, this instrument of December 30th, it is entirely silent as to anything for Mr. Gross at all? Is that the import of what you are saying?

MR. GRUTMAN: There is a schedule, your Honor.

MR. SHAW: There is a shcedule, your Honor, that sets forth this is a schedule of potential.

THE COURT: And it is entirely silent as to Mr. Gross.

MR. MANDEL: Let me answer your Honor's question.

MR. SHAW: I am sorry. I thought the Court had asked me a question and I am responding.

THE COURT: Your question, embedded in some question to which the witness said yes was that there was no provision for Mr. Gross in the December 30th instrument.

MR. GRUTMAN: There is no place for him as a signatory.

MR. MANDEL: There is a little more than that. Look at the top of Page 19, your Honor.

(Mr. Mandel hands document to Court.)

MR. SHAW: Whose exhibit is that, the December 30th?

THE COURT: Defendants' NNN in evidence.

MR. ROTHMAN: It came in with Mr. Silverman.

MR. SHAW: It does not have a schedule annexed to it.

MR. MANDEL: You recall that Mr. Silverman wrote --

THE COURT: Here, Page 19.

MR. GRUTMAN: Judge, I take it you want the truth about this.

THE COURT: I want to get an idea of the picture. Let me put it that way.

MR. GRUTMAN: What I think your Honor will see from all the documents is that there is a reference on Page 19 which Mr. Mandel has directed your attention to, but the document as completed had a schedule, and in that schedule there is reference made to Gross, Bleich & Donoghue. Let me see if he can get the document.

MR. SHAW: And Bracker as well, too.

MR. GRUTMAN: And bracker as well, too. I recall that.

MR. MANDEL: I think my friends are in error.

THE COURT: Mr. Muh was asked, isn't it so there was no provision for Gross in the 12-30 agreement; and his answer was that is correct.

What did you mean when you made that statement? Let's go at it that way.

THE WITNESS: As I recall, he was not an anticipated or required signer of the document,no provision for his signature or acquiescence was provided in it if I remember correctly.

THE COURT: All right.

THE WITNESS: I don't recall if, as one of the schedules of possible legal matters or any other schedules he was on that.

THE COURT: All right. But then the next question that you asked was on January 15th, you and Risher and Persky were a deputation to go to Mr. Mandel's office to try to make some kind of an agreement, and Mr. Mandel said what happened between December 30th and January 15th, and you said you didn't know.

THE WITNESS: That is correct.

THE COURT All right, now at any time in preparing to go over, in going over, did you and Mr. Risher and Mr. Persky have a discussion as to the reason for your going over, what you expected to obtain by going over?

THE WITNESS: Yes, sir, in my mind, including December 30th, if a settlement or compromise with Mr. Gross could have been reached, that wouldhave been acceptable to the limited partners and subordinated lenders -- that was the key, they were the ones, the limited partners who were raising all of these objections, and as far as I was concerned, the meeging with Mr. Mandel, and I don't know if he called the meeting or Mr. Persky or Mr. Risher suggested it -- I did not -- was to see if some agreement could be reached between us that might be presented to the limited partners and that would be acceptable by them.

Now, perhaps Mr. Mandel had spoken, after he was retained by Mr. Gross, to the limited partners and stated his case. I don't know that, sir. I don't remember why the meeting was called.

I from day 1 never felt that we shouldn't attempt some type of agreement with Mr. Gross.

THE COURT: All right. Go ahead, Mr. Mandel. You were after the meeting at this point.

Q I would like to clear up one thing with Mr. Muh if I can.

The December 30-31 was an all-night stand for a preliminary agreement, right?

A Yes, sir.

Q Schedules were not prepared at that meeting, were they? Papers were signed without schedules and subject to later schedules?

A You may be right, Mr. Mandel. I know there were references to numerous schedules. I don't recall if they were prepared a day or two later or if they were all there at the time. I know there were many references to schedules but I don't know if they were actually affixed to the documents.

Q You remember that Mr. Persky later sent out schedules about January 11th?

A I am sorry, sir, I don't recall that.

MR. MANDEL: I would like at this time to offer in evidence --

MR. SHAW: It is in evidence already. I think I know what it is.

MR. MANDEL: Mr. Shaw believes OO is in evidence.

MR. ROTHMAN: It is already in as P-100.

MR. MANDEL: With that in mind I don't have to question Mr. Muh because the document establishes the thin about the exhibit.

Q The meeting was January 15th, right?

A Yes, I believe so.

Q And you were -- at this time Mr. Kayne and Mr. Sloane were in California?

A That was their residence and where they worked, yes, sir.

Q You don't remember a call being made from the lobby of my office, it may have been, you don't deny that it was made?

A No, I don't deny that. I did not make a call, that is for sure.

Q You don't remember waiting and getting a report from Risher or Persky or whoever made the call?

A Definitely not.

Q All right. At this time you were in contact frequently with Mr. Kayne?

A That is correct.

Q And do you recall his telling you at any time that he was coming to New York and would meet with Charles

Gross about January 23rd, that he would have a contract at making a deal with Gross or trying to bring Gross into line?

A I know he was coming to New York in that time period, and I found out or he had mentioned that at some time he had a meeting with Mr. Gross. He did not say, "I am coming to New York for that purpose," but he did come to New York, and I believe he had a meeting with Mr. Gross.

Q And did he report to you what happened at the meeting?

A All I recall is that he had a meeting with Mr. Gross and was not able to come to a settlement or could not convice Mr. Gross to go along with our transfer.

Q He told you that?

A I believe so, yes, sir. It is confusing now if he told me then or I learned that afterwards. I don't remember when I acquired that knowledge but I remember that happening.

Q At about that same time he told you he was going to start action against Gross; is that right?

A I believe it was prior to that. I think he had called me from California.

MR. GRUTMAN: May I have that question back?

MR. GRUTMAN: I missed the chronological sequence.

(Record read.)

Q So was it your understanding that he was going to bring action against Gross, whether or not Gross came along with this deal?

A Yes.

Q Mr. Muh, don't you recall you attended the February 5th and the February 8th meetings, right?

A That is correct, yes, sor.

Q And at both of those meetings there was talk about releases from everybody to everybody if the deal went through?

A Yes, sir.

Q So that Mr. Kayne's action would either not be brought or would be aborted if a deal was made with Gross, that was your understanding, right?

A As part of the settlement discussions, that was, I believe, offered, or you -- I don't remember who first suggested it but you are correct that someone said there should be total releases between the partners if an agreement can be reached, yes, sir.

Q And everybody seemed to go along with that idea?

A Yes, sir.

Q Do you also recall that in the negotations on February 5th or 8th and otherwise, Mr. Mandel said on behalf of Gross, "If youthink these claims are worth something, we are still willing to make a deal if it is the right deal without the claims and let you keep your claims for whatever they are worth." Do you recall that?

A Yes, sir.

Q . Do you also recall that at the February 5th meeting at least there was discussions of the claims against Gross?

A I don't specifically assign it to the 5th or the 8th, sir, because I --

Q One or the other?

A Yes.

There was discussion of the claims against Mr. Gross during the course of the "Settlement" or compromise discussions.

Q And one of the matters mentioned was the Buckley claim, right?

A Yes, sir.

Q And you still say you didn't know what the Buckley claim was all about?

A When I say I didn't know what it was about, by that point in time I knew that there had been an assignment of a churning claim. I have never looked at the documents. To this date I have never seen a single transaction record on that account, and could not in any way give you any feelings or indications of whether there was churning, wasn't, or any other such matter on that but I did know there was a churning claim and that if there was a valid claim it was then the property of the partnership against Mr. Gross. I did know that.

Q And you got that information from Risher or Persky?

A I believe from Larry Berkowitz, possibly from Bob Persky but I don't believe it was from Mr. Risher.

Q You were aware too, were you not, that Persky was the one who worked out the settlement and got the assignment?

A Yes. Yes, I was.

Q And that Persky did this during December, while he was representing the organizing group of the corporation as well as the partnership?

A Yes, he was handling -- the firm of Finley, Kumble handled several of the lawsuits for the partnership, that is correct.

Q I would like to go with you now, Mr. Muh, into the night of February 11th in connection with Mr. Burak and in connection with Mr. Persky's opinion letter. You were present on the night of February 11th, right?

A Yes, sir.

Q At some point during the evening the transaction stopped because Mr. Burak said he would not give an opinion letter, that the transactions would be properly and legally authorized without the consent of Bleich and Donoghue?

A Mr. Mandel, I don't recall the latter part of that statement. I specifically remember Mr. Burak saying that his firm would not issue the opinion letter.

I don't recall that he said it becuase there would not be signers. All I remember is thathis firm had decided or he had decided that they would not issue the opinion letter.

THE COURT: What opinion letter?

THE WITNESS: The one that was required as one of six documents as part of the transaction.

THE COURT: What did you understand the opinion letter to be?

THE WITNESS: A document stating that the partnership was allowed or legally allowed to enter into this transfer. I had had a similar -- a month before on the sale of the Buffalo Braves, an opinion letter was required.

It was a formality and it merely stated that so and so is allowed to transfer and enter into this agreement, and to me that's all it was.

Q You thought it was an empty formality?

A Perhaps not empty but a legal requirement that did not have overriding significance at the time.

Q You knew Mr. Burak and his firm, the Rosenman firm, were the attorneys who represented the partnership in connection with the transfer agreement?

A Yes, and as well several of the individual partners, yes, sir.

Q And you knew that when Mr. Burak said he would not give an opinion, there was quite a bit of reaction amongst everybody present?

A Yes, sir.

Q And you knew it threatened the consummation of the transaction?

A I guess I understood that without an opinion letter, the deal would not be able to close, yes, sir.

Q Were you present in the courtroom when I read from the deposition of Michael Bamberger'

A No,s ir, I don't believe so.

Q Do you know who Michael Bamberger is?

A Yes, sir.

Q Who is Michael Bamberger?

A He is now, I believe, a partner at Finley, Kumble.

Q And he was working with Persky during January and February then, either a partner or associate of Finley, Kumble?

A Yes, sir, I don't know which status.

Q Working on the transfer agreement?

A He had, yes.

Q Do you recall having a meeting with Persky and Bamberger and yourself and Risher and Kayne in the Finley, Kumble office on the night of February 11th regarding the significance of the opinion letter and what should be done?

A No, sir, I did not.

Q Don't you recall that you and -- well, first do you recall that there was a meeting in a separate place between Persky and Bamberger and you and Risher and Kayne or maybe Kayne?

A Mr. Mandel, I don't recall such a meeting that evening concerning any matters.

Q Do you recall Persky or Bamberger telling you at any time or your hearing them say that one possible way of handling this question was to drop the deal?

A I do not recall that having been said to me that evening by Mr. Persky or Mr. Bamberger.

Q You don't recall hearing that in your presence?

A It occurred to me, but I do not recall that having been stated by someone from Finley, Kumble.

Q Do you say it didn't happen or that you don't remember one way or the other?

A To be honest, I don't remember it happening. It's possible it was said, sir. I have no recollection of it.

Q Do you recall Persky or Bamberger asking whether they have the authority of the corporation to act as special counsel for the partnership in order to render an opinion letter?

A They did not ask me that question. Logically, I don't think I would have been the one they would have asked. It would probably have been Mr. Berkowitz if such a question was asked.

Q As far as you know, was such a question asked?

A As far as I know, it was not asked, sir.

Q You said you think they would have asked Berkowitz, and why do you make that? Is it an assumption on your part?

A Yes, sir, it is . Only because he was

counsel. That sounds like a legal question.

Q Did you ask Persky what the implications were of Burak's failure to issue an opinion?

A No, I believe at the time I asked Larry Berkowitz and I think because he was there or he was near me, and I believe it was Mr. Berkowitz, I am not positive, who said that we have to have an opinion letter. That was really the extent of the conversation.

The entire meeting didn't stop as you really had kind of prefaced it. If I recall we continued collating other papers and going through other documents.

We didn't just have 25 people sit in the room and wait until something happened. There were just so many things to be done that evening.

THE COURT: You say Mr. Berkowitz said "We have to have an opinion letter"?

THE WITNESS: I believe it was someone, I believe it was Mr. Berkowitz told me the transaction required an opinion letter, yes, sir.

Q Did you have any further discussion with him about that?

A No, the next discussion I recall being involved in was after an opinion letter was circulated to everybody that had by then been drafted by Mr. Persky.

Q But you gave no authority, is that right?

A No, sir, I did not.

Q And as far as you know no authority was given to him on behalf of --

MR. GRUTMAN: Now, your Honor, we have had it six times and I think it's irrelevant.

THE COURT: Sustained.

Q Now I would like, Mr. Muh, to refresh your recollection with your deposition taken on January 20, 1972, and I refer to Page 94.

MR.GRUTMAN: Already been read, your Honor.

MR. MANDEL: I am refreshing his recollection.

MR. GLATZER: He hasn't indicated that his recollection needs refreshing.

MR. GRUTMAN: I read from 92 through 97.

MR. MANDEL: That's all right. I would like to put it to this witness now and there is no reason why I shouldn't in view of his testimony, which I think is in conflict with what he said on the deposition.

THE COURT: All right. On that basis I will permit it. Go ahead.

MR. MANDEL: Pardon?

THE COURT: On that basis I will permit it. Go ahead.

Q Page 94, line 15:

"Q So far as you know, it was just -- and you didnt' hear why he wouldn't do it and you never asked anybody, is that correct?

"A That is correct. I wasn't particular concerned. I didn't see any reason to be. I asked counsel what the implications were.

"Q What counsel?

"A . My counsel.

"Q Mr. Persky?

"A Correct.

"Q Did you ask Mr. Persky to issue such a letter instead of the Rosenman firm?

"A I personally didn't, no, I am pretty sure someone from the corporation did."

Having heard that, Mr. Muh, is your recollection refreshed in any way?

A I still assume, as I stated there, that someone from the corporation did ask. I would have assumed it would have been Mr. Berkowitz. I have no -- and that's what I intended to convey there.

Q But you did speak to Persky and yoou asked him what the implications were?

A Either Persky or Berkowitz. I know I asked what the implications were and someone informed me the transaction required an opinion letter, and that it couldn't go through apparently without one. I may have spoken to Mr. Persky, but I did not authorize or was not asked to authorize the issuance of such.

Q At any rate, you knew before the transaction was completed that Persky had issued an opinion letter?

A Oh, yes, sir.

Q And you knew that he issued it as special counsel for the partnership?

A Yes, I did.

Q And if you didn't authorize it, you at least ratified it and approved ot it and accepted it then?

A That is correct.

THE COURT: Are you going onto another subject?

MR. MANDEL: No. I am going with that subject.

THE COURT: To another subject?

MR.MANDEL: Yes.

THE COURT: Then we'll take our recess.

MR. MANDEL: Allright, thank you, your Honor.

(Recess)

Q Mr. Muh, there came a time during January of 1971 when you had some discussions with Mr. Berkowitz about a letter from Rafkind which wanted cleanace for Gross to work for Rakfkind, right?

A Yes, sir.

Q And do you recall that Rafkind wanted to employ Gross as a trader?

A I don't recall that it was a trader. I knew they wanted to employ him in some capacity. I did not remember at that point that it was as a trader, though that would have been logical.

Q Did Berkowitz report to you that he had had some telephone calls with a representative of Rafkind?

A No, only written correspondence.

Q Was that all Berkowitz mentioned to you?

A Yes, sir.

Q During January and February, that was the period when you were operating the company, the partnership technically but recognizing it would be for the benefit of the corporation, is that correct?

A As I stated earlier, yes, sir.

Q And Berkowitz called to your attention a letter from Rafkind to Robert Newburger asking for clearance for Gross to work for Rafkind, right?

A Yes,sir.

Q And Newburger had turned it over to Berkowitz, is that right?

A Apparently, yes, sir.

Q And Berkowitz asked you what to do with it?

A No, sir. He showed me both the request from the Rafkind firm and a letter that he had written in response to it.

Q Which had not yet been mailed?

A I genuinely don't recall if it was before or after or the same day. I do remember him showing me both letters, and the conversation, which was a very brief one, was rea-ly a question on my part to the extent of is this -- there was a citation in it from the partnership agreement, and I asked him,

"Is this accurate? Is this what was in the agreement?"

And he said, "Yes, this is accurate."

Q I'd like to get to the question of whether you saw it before it was sent.

A It's quite possible I did, yes, sir. I am not denying having seen it before it was mailed.

Q And approving the mailing of it, right?

A Whether it was beforeor after, I didn't disapprove of it and if it had been before, in effect I would have said "As long as it is accurate, I see no problems with it." Before or after I would have taken that same position so if not saying don't mail it is approval, then, yes, I would have tacitly approved it.

Q Do you recall that in deposition you said in effect --

MR. SHAW: Page?

Q -- that you think you and Risher saw it before you mailed the answer?

MR. GRUTMAN: What page, please?

MR. MANDEL No.

MR. GRUTMAN: What page, please?

THE COURT: He is asking just generally.

MR. MANDEL: I am asking generally.

MR. GRUTMAN: Then I don't think it should be prefaced by saying, "Did you say in deposition."

THE COURT: Let's see if it will save time.

Q That you saw it before the letter was sent out and you believed Mr. Risher did too, and that you said you had an opportunity to change the decision, and youdidn't, so that to that extent, you approved it.

MR. SHAW: Objection, your Honor.

THE COURT: I think you better get down to the page, Mr. Mandel. You are going beyond just a simple suggestion

Q Page 14.

MR. GRUTMAN: That has likewise been read into the record.

Q I will start with line 9:

"Q Did you participate in any decision in connection with respect to that communication?

"A To the extent that Mr. Berkowitz, who as house counsel was responsible for all such requests, he read to me" -- I will skip colloquy

"Q I am not asking you to tell me whatyou said to Berkowitz or what Berkowitz said to you. I am merely asking you first when you participated whether you made a decision.

"A As an officer, I had an opportunity, I suppose, to change the decision made by Mr. Berkowitz and I didn't. So to that extent I approved it, but the matter was handled by Mr. Berkowitz.

"Q He made the decision as far as you are concerned?

"A Right, subject to having shown them to me and I believe Mr. Risher.

"Q You and Risher approved whatever it was that Berkowitz did?

"A We didn't disapprove of what he did."

A That's accurate, yes, sir.

Q Do you now recall your conversation with Berkowitz that Mr. Gelb won't let you testify?

MR. GRUTMAN: Now, that is objected to. That is really objected to.

MR. MANDEL: Why are you objecting to that?

MR. GRUTMAN: Because that's not right.

MR. MANDEL: What is the ground? The deposition reveals that Gelb stopped by an assertion of attorney-client --

MR. GRUTMAN: The fact that Mr.Gelb made an objection --

MR. MANDEL: Please don't interrupt me.

MR.SHAW: Your Honor, this is improper.

THE COURT: Let Mr. Mandel make his legal position.

MR. MANDEL: -- by the assertion of attorney-client privilege, this gentleman and Mr. Berkowitz were then purporting to act as attorneys for the partnership. We have later had it established QQ

MR. GRUTMAN: Judge, this is a speech. This is not anything. This is drivel.

MR. MANDEL: Please, you keep interrupting. We have had it established by Magistrate Goettel's opinion, which was accepted by Judge Owen earlier, that there can be no privilege as against a partner. My clients, Bleich and Donoghue, were partners at this time. So that if Mr. Muh remembers his conversation with Berkowitz, he should now be required to set them forth.

MR. GRUTMAN: That is not my objection. My objection is that Mr. Mandel characteristically does it in the groin or in the eye. I have asserted no privilege here, not once in this trial and to make the snide reference --

THE COURT: What is the objection?

MR. GRUTMAN: The objection is that now will you give me the answer that Mr. Gelb wouldn't let you give. That is my objection.

MR SHAW: He is asking the Court to draw an inference from the assertion of a privilege during the deposition. We all know that no such inference is to be drawn.

THE COURT: Then we wasted a minute or something where let us just ask him what did you and Mr. Berkowitz -- what did Mr. Berkowitz read to you and what did you say?

THE WITNESS: I thought you read exactly what the conversation was. I ended up telling you at the deposition what that conversation was with Mr. Berkowitz.

THE COURT: No, you didn't, not according to this.

THE WITNESS: Mr. Berkowitz said something to the effect of here are the letters I received from Rafkind and here is the reply and as I say I don't recall if they had been mailed or not. And I looked at them and said "Is this accurate?" Or "Is this language correct and is there anything wrong with it?"

And he said no, it is exactly right. That was really the whole conversation that's why I don't understand.

Q Perhaps we could go beyond that a little bit. Rafkind's letter asked for permission to employ Gross, is that right?

A Yes, sir.

Q And do you remember what Berkowitz' letter answered?

A In effect that there was a clause in the partnership agreement of which Mr. Gross had been a party, that had certain limitations, I am not sure what they were, on activities in Wall Street.

Q Forbidding that proposed employment, is that r right?

A I don't specifically know if it included what he was to be doing at Rafkind, which is why my only concern was is it accurate, is the words that you put in the letter exactly as they are in the agreement that Mr. Gross signed, and he told me they were. I drew no opinion of whether it meant he could or could not work for them. I don't know whether that partnership agreement would bind Mr. Gross not work as a trader for someone else.

Q You are stating, and I call your attention to quadruple B, which is the letter -- you agree that quadruple B is the letter that Berkowitz gave you to read?

A I believe so. It's been a number of years but the matters in it appear to be the right letter.

Q Is it fair for me to say that you understood quadruple B to be saying to Rafkind "No, we'll not clear Gross to work for you because we have this non-competition clause?

A No, sir, I felt that there was an obligation to inform them of all the facts as we knew them. As far as I am concerned, this doesn't say you can't although it obviously has an inference that there may be some difficulties, there is no question about that. I seem to recall that there was a second letter from --

Q Let's talk about this letter, sir.

Isn't it your understanding and wasn't it then that quadruple B says in effect to Rafkind we have a non-competition clause covering Gross, so you better not employ him and this confirms our telephone conversations on the same matter. Here is a copy of the non-competition clause.

MR. SHAW: Objection, your Honor, the letter speaks for itself. It is for the Court to --

THE COURT: Sustained.

MR. GLATZER: The purport of the letter to Rafkind --

THE COURT: Sustained.

Q Did you feel on that day when you approved quadruple B, that Mr. Gross' employment by Rafkind in any capacity could injure the prosperity or well being of the partnership or of the corporation?

A I had no reason to believe that.

Q As far as you were concerned, whatever Gross did after Rafkind, it wouldn't make any economic difference to the partnership or the coproration?

A That is correct.

Q Did you consider the possibility that you should say "Sure, Rafkind, as far as we are concerned, hire Charles Gross. What's the difference? Have a good time"?

A The problem with that, Mr. Mandel, very honestly, and I didn't go through this in-depth logic at that time, was that I would have been withholding information and that was factual. I don't know whether it's legally binding or not. I have absolutely no idea but there was in fact this agreement signed by Mr. Gross. I took no action. He was already working for a New York Stock Exchange firm at the time and I certainly didn't do anything to stop him from working there.

Q . As a businessman, you knew that if Newburger, Loeb had an agreement which prevented Gross from working somewhere, and it was valid, Newburger, Loeb could say "We don't care, hire him".

MR. SHAW: Objection, this is speculation.

MR. MANDEL: No, no.

THE COURT: No, overruled.

MR. GLATZER: How does he know what Newburger, Loeb would say?

A Members of the partnership could have said that, that is correct. I could not.

Q And you were running the business but taking decisions to members of the partnership?

A Correct.

Q Actually Bob Newburger had given it to Berkowitz without instructions, right?

A I don't know that, sir.

Q You don't know?

A I know he gave it to Berkowitz. I don't know that Bob Newburger instructed him on what to bring or not.

Q Did Berkowitz tell you Newburger had given him instructions?

A He didn't comment whether he had or had not.

Q You could have gone to Newburger and said to him don't you think we should let Gross have this job and not stand in the way?

MR. SHAW: Objection, your Honor.

MR. GLATZER: Objection, speculation.

MR. SHAW: That's argument.

MR. GLATZER: He could have done anything, your Honor.

THE COURT: Given that statement, I will sustain the objection.

MR.MANDEL: All right.

Q I will rephrase it.

THE COURT: No, you have gotten an answer. He could have.

Q Do you adopt that statement, Mr. Muh?

A I could have done any number of things and I did not, yes, sir.

THE COURT: He did not, that is right.

Q Did it occur to you?

A No, sir, it didn't.

Q That maybe you should go to Bob Newburger or one of the partners and say to them "Does the partnership wish to deprive Gross of this opportunity to earn a living"?

MR. SHAW: Objection.

THE COURT: It didn't occur to you. I take it it did not occur to you?

THE WITNESS:No. It seems so logical that they would ask a member of the partnership if in fact they would waive that agreement, if in fact it was binding. That seemed to me like such a simple thing that for me to attempt to do it, and I didn't get involved.

Q Who should ask for it? You said it's so logical that they would do it.

A Rafkind to go now and say "Okay, we were not aware of this." As far as I know, this was the end of the whole matter.

Q You know there were two later letters?

A No, I know of one that I mentioned that Mr. Berkowitz went on the record as saying, "We were not intending to tell you not to hire Mr. Gross."

Q Now, wait a minute.

Did you later become aware of quadruple C for identification?

A I have never seen the letter. I was aware of the decision.

Q Is it fair to me to say that you become aware that Rafkind wrote back saying "In view of the objections rasied by your letter of January 26th, 1971, we have decided not to employ Mr. Gross."?

A I did not know it was written form, sir. I knew that they informed Mr. Berkowitz they were not hiring him.

Q You knew of the fact?

A Yes, sir.

Q Did you then have a further conference with Berkowitz about what should be done about thismatter?

A Again in the same manner he had done before, he showed me a letter that he had written to Rafkind.

Q Did he consult with Risher as well as you?

A I would assume so but I don't know that factually.

Q You approved quadruple D before Berkiwitz sent it out, right?

A This letter I am pretty sure had been mailed before I saw it. He showed it to me. This one, the other one I probably saw -- might have seen before it was mailed. This one I don't believe I did but I remember seeing it. He did show it to me.

Q And you knew the contents of it, is that correct?

A Yes, yes, sir.

Q And did Berkowitz tell you that he had sent a copy of it to Persky?

A No, sir.

Q Did Berkowitz tell you he had consulted with Persky about it?

A Not to my recollection.

Q Off the record you are looking.

A I am looking to see if there is a copy.

Q There is another one that says "CC Persky." That's off the record. It's in evidence.

A How can one have it and the other not?

Q Line CC. That's not unusual. But it's in evidence so we don't --

MR. SHAW: That was the document that was.

MR. GRUTMAN: Snatched out of my hand.

MR.MANDEL: That is right, that's the document I snatched out of the Mr.Grutman's hand and I will apologize again for rudeness.

MR. GRUTMAN: Just don't do it, Mr. Mandel. I don't need your apology.

MR. MANDEL: I haven't snatched any this week.

Q Mr. Muh, quadruple D does not say "Go ahead and employ Gross", does it?

MR. GRUTMAN: Objection.

THE COURT: Sustained.

Q As you understood it?

MR. GRUTMAN: Objection.

MR.MANDEL: No.

THE COURT: No, you have got to go beyond the instrument, obviously, before you get to anything that avoids this objection.

MR. MANDEL: He said he saw the instrument after it was mailed.

THE COURT: Allright.

Q You made no effort to change the decision and communication from the partnership communicating with Rafkind by quadruple D, did you?

A No, sir.

MR. GLATZER: I object, your Honor. There is an inference there that there was a decision by the partnership. I think that is improper.

Q Mr. Berkowitz wrote as the attorney for the partnership, did he not?

A Yes, sir.

Q He was authorized to write this letter on behalf of the partnership, was he not?

A Yes, sir, by virtue of his position within the partnership.

Q As attorney?

A Yes, sir.

Q And you became aware of what he had done?

A Yes, sir.

Q At a time when you were operating the business?

A Yes, sir.

Q And you also had in mind that the interest of the corporation might be affected by this after February 11th?

A By this involvement?

Q Yes.

A I don't see the connection.

Q All right. With that foundation, was it your understanding that the response, quadruple D, was intended to give the partnership's consent to the employment of Gross by Rafkind?

MR.GRUTMAN: I object to that.

THE COURT: Let me hear it back.

MR. GRUTMAN: Calls for an opinion, a conclusion, and an interpretation of the document which speaks for itself and is in evidence.

(Last question read.)

THE COURT: No, I will permit it. Gc ahead.

A No.

Q Mr. Muh, on January 15th, do you recall that Paul Risher wrote a letter to the Stock Exchange about Jeanne Donoghue? And I mean January 15, 1971.

(Document handed to the witness.)

A I don't know the specific letter but the conversation is on subjects like this were going on continually during this period.

Q Do you recognize Risher's signature on this Xerox copy?

A Yes, sir.

MR. MANDEL: I would like to offer quintuple --

MR. ROTHMAN: It's already in as 101.

MR. SHAW: Plaintiffs' 101 which I presume I offered in evidence.

Q Were you aware that on January 15, 1971, Risher had written to the New York Stock Exchange saying "This letter is to let you know that thus far Jeanne Donoghue has not signed the agreement between Newburger, Loeb & Co. and Newburger, Loeb & Co., Inc.

"In the event that she does not sign, we intend to seek the acquiescence of the present limited partners and subordinated lenders to pay Jeanne Donoghue the $75,000 due her in accordance with the provisions of the existing partnership agreement. If she does not sign, and the other partners acquiesce, we intend to proceed with the closing in accordance with the present executory agreement.

"Sincerely Paul D. Risher."

Were you aware of that on January 15th?

A Not of the letter but of the scope of the letter, yes, sir.

Q And it was your understanding that Jeanne Donoghu was entitled to $75,000 plus interest if she did not go along with the deal?

A No, sir, it was my understanding that she was entitled to something as stated in the partnership agreement and it was generally not clear to me what she was entitled to, but clearly she had some rights in that partnership agreement.

Q This letter says 75.

MR. GRUTMAN: That is argument.

Q Were you aware of the position that --

A Yes.

Q -- Risher --

A Yes, the important thing in that was the entire -- that amount was subject to the agreement of the limited partners. It didn't say that's what she was entitled to in the agreement but that it needed special permission of the limited partners and subordinated lenders. That's why we were constantly in a bind that we couldn't do anything without the limited partners saying yes, because of their strong position and their feelings, vis-a-vis Mr. Gross.

Q I call your attention to triple E in evidence, which is a document dated February 2nd signed by Robert Newburger.

A Yes, sir.

Q Were you aware of that letter when Mr. Newburger sent it out on February 2, 1971?

A Best of my knowledge, I have never seen it before.

The fact of Mabel Blecih's withdrawal I knew. I genuinely never saw that letter.

Q Were you talking to Paul Risher many times a day?

A Yes, sir.

Q In this period?

A Yes, sir.

Q I am reading to you from triple E, second paragraph:

"Paul Risher has advised me that if Miss Bleich withdraws, the corporation cannot be formed, and in all likelihood the form of Newburger Loeb & Co., will be liquidated in accordance with the request of the New York Stock Exchange."

Were you aware that Risher had given such information to Newburger and that Newburger had given ti to the limited partners and subordinated account holders on February 2, 1971?

A No, sir.

MR. MANDEL: Nothing further.

REDIRECT EXAMINATION

BY MR. SHAW:

Q Mr. Muh, the first time that --

THE COURT: Wait a minute, Mr. Shaw, there is only one redirect here. I assume you cross examined.

MR. SHAW: This is something that Mr. Mandel has brought out, your Honor. This solely relates to what Mr. Mandel has brought out.

THE COURT: But I don't understand that everybody has a right to have redirect of a witness, of a party just because he happens to be on a particular side of the caption.

MR. SHAW: Is your question the order? Should Mr. Glatzer go first?

THE COURT: No, I am not aware that you have a right to examine at this point. Is it something unusual? Because otherwise you have examined before, and now Mr. Mandel examines, and now you examine again and this is not your party.

MR.SHAW: But this is with respect to the intimation that Mr. Mandel brought out for the first time outof this witness' mouth, at least on his cross examination, and it affects the interests of my client.

THE COURT: To a limited degree I suppose -- Mr. Glatzer, do you have any objection.

MR. GLATZER: I don't have any objection. I have questions but they can -- I don't have any objection to anybody else asking questions.

MR. SHAW: Your Honor, if it will save time, I will consent to Mr. Glatzer going first so I don't duplicate.

MR. GLATZER: No objection.

THE COURT: Normally after everyone has cross examined he has redirect and that is the end of it.

MR. GLATZER: We will run down the line and I will go last.

MR. SHAW: Is that the way you want it to be done?

THE COURT: Let's do this on a limited basis. I am not permitting two cross examinations of each of these witnesses as they come along.

Go ahead.

MR.MANDEL: Is it my understanding that Mr. Shaw will inquire solely with regard to Risher's involvement?

THE COURT: I understand that.

MR. SHAW: Well, Risher and the corporation who I represent as well as Aixala, although Aixala is not mentioned at all and solely with respect to what Mr. Mandel has brought out.

THE COURT: All right.

REDIRECT EXAMINATION

BY MR. SHAW:

Q Mr. Muh, Mr. mandel asked you questions with respect to your attendance at a meeting of January 15th at Mr. Mandel's office, correct?

A - Yes, sir.

Q In the course of the conversation in Mr. Mandel's office, did Mr. Persky state that it was his view that Section 98 was in fact a bar, as Mr. Mandel was contending, to the transaction if Bleich and Donoghue did not consent to the transaction?

A Mr. Shaw, I never heard mention of the term Section 98 until well after this transfer.

Q . In other words, is it your recollection that Mr. Persky acquiesced in any way to what Mr. Mandel was saying to January 15th with respect to the necessity for these signatures?

A No, sir. I stated earlier Mr. Persky disagreed with Mr. Mandel's general statement that the transfer could not go through without all the signatures.

Q And did he disagree in the course of the meeting of January 15th to Mr. Mandel's face?

A - Yes.

Q And did you hear the word that Mr. Persky said?

A Yes.

Q And did you understand them?

A Yes, but there was still no reference to Section 98.

Q All right..

There was a reference to the necessity for certain consents, correct?

A Yes.

Q All right. And can you recall in substance what Mr. Persky said in support of his position that the consents were not required to Mr. Mandel on this occasion?

A Mr. Shaw, there was not a lengthy legal dialogue. It was "I disagree with your supposition that all the signatures are needed." That's all I remember.

Q To your knowledge was this the first time that you had heard this subject matter being raised?

A It's the first specific recollection I have of it.

Q Thereafter, did you and Mr. Persky and Mr. Risher leave Mr. Mandel's office and have a conversation about the subject matter?

A I do not remember logically we would have. I don't remember where I went or what I did upon leaving Mr. Mandel's office.

Q Can you recall anything to the effect being raised by Mr. Risher subsequent to the meeting in Mr. Mandel's office wherein Mr. Risher asked Mr. Persky whether he was sure of his legal position that the consents were not required?

A Yes, I believe I asked the same question.

Q When did you ask that question of Mr. Persky?

A I don't remember an exact time and place. I know I asked the question of can we go ahead with this transaction, you know, missing one, two, three signatures.

Q When for the first time did you ask that of Mr. Persky?

A I believe it was after this January 15th meeting because it was the first time the question that I can remember was asked.

Q And what can you recall Mr. Persky telling you?

A Mr. Shaw, I don't recall the exact words, just that he was confident the transfer could take place without everyone signing.

Q Did he give you any basis for his opinion?

A No, sir.

Q Did you rely upon Mr. Persky?

A Yes.

Q When he said that?

A Yes, I did.

Q Subsequent to the first time you and Mr. Persky and Mr.Risher had this conversation, in which he said he was confident that the transaction could go forward, did youhave another conversation with Mr. Persky to the same effect?

A Mr. Shaw, I don't recollect individual conversations. I am sorry.

Q Let me ask you this way: Were there more than one conversation between you and Mr. Persky about whether or not the transaction could go forward if it did appear that Bleich and Donoghue or any other limited partner did not in fact consent to it?

A Yes, I am sure there was one occasion on which this was discussed.

Q And on any occasion did Mr. Persky tell you that he was unsure or that it was unclear or that the transaction could not go forward without their consents?

A He never stated that to me.

Q On February 11, 1971, you became aware that an opinion letter had been written by Mr. Persky to the effect that the transaction could go forward without these consents, is that correct?

A That is correct.

Q As of that point did you rely upon what Mr. Persky wrote?

A Yes, I did.

Q And did you rely upon what he said?

A Yes, they were the same.

Q And did you rely upon his opinion?

A Of course.

Q On that occasion, did you have an opinion contrary to that of Mr. Persky?

A Definitely not.

Q On that occasion did anybody in the room at Finley Kumble, the conference room where the transaction was being put together, express in your presence a differing opinion?

A No, sir.

Q You had been involved, I think you indicated in the course of the examination by Mr. Mandel, in other transactions where opinion letters were given, correct?

A Yes,sir.

Q The matter of an opinion letter was --

THE COURT: Mr. Burak had expressed a different opinion.

MR. SHAW: Pardon me.

THE COURT: Mr. Burak had expressed a different opinion, right.

Q Will you answer the court's question.

THE WITNESS: Your Honor, the fact that Mr. Burak allowed his client to sign the agreement made it very clear to me that there was certainly nothing illegal about it because no attorney who believed it was illegal --

THE COURT: Mr. Shaw's question was did anybody express a different opinion.

THE WITNESS: I am sorry. I though the question was that it was not a valid opinion letter.

THE COURT: No. This is on the subject of the absence of the signatures.

Q Can you recall Mr. Burak being present at the meeting on February 11, 1971?

A Yes, sir.

Q And can you recall what he said if anything in your presence regarding an opinion letter or an opinion?

A Yes, sir. All I heard Mr. Burak say is that the firm had decided not to issue such an opinion letter. He did not state that I heard the reasons for refusing to issue that letter.

Q Did he say --

THE COURT: Wait a minute. Mr. Muh, you tell me what you heard.

THE WITNESS: That he or his firm -- I don't know which -- had decided not to issue the opinion letter in this transaction.

THE COURT: Is that exactly the way he put it.

THE WITNESS: No, sir, I don't remember his exact words but that was the impression it left me with. It created a stir in the room and some -- very frankly some annoyance on thepart of almost everyone in the room that they were finding out at this last minute that there was not going to be an opinion letter issued by counsel to the partnership.

THE COURT: Did he use the word opinion letter or did he say something else?

THE WITNESS: Your Honor, I genuinely don't recall. I thought he had used the word opinion letter but I am not positive.

THE COURT: All right.

Q Did you hear Mr. Burak say that his firm would not issue the opinion letter because it wasn't their belief that the transaction could go forward without these persons' consents?

A No,sir, I did not hear that stated by Mr. Burak or anyone else from his firm.

Q Just that they would not issue the opinion letter, period?

A That is correct.

Q You know a phony opinion letter when you hear it or you see it, don't you?

THE COURT: Sustained.

Q All right, let me ask you tyis question. Did you think the opinion letter was a sham?

A No, sir.

Q I think you indicated that insofar as Rafkind is concerned, regarding the exchange of correspondence, certain things in response to what Mr. Mandel asked you. Let me ask you this question: To your knowledge, were the partners --

THE COURT: Wait a minute. Mr. Muh, in response to a question of Mr. Mandel's, my notes show you understood that opinion letter to mean -- it involves the subject of the partnership can lawfully enter into the transaction. I roughly took down approximately what you were saying.

THE WITNESS: Approximately, yes.

THE COURT: Where did you learn that was the subject of the opinion letter that was the subject of discussion? Was it that night?

THE WITNESS: Yes, by reading the opinion letter.

THE COURT: When Mr. Burak said he wasn't going to give an opinion letter, you said you understood that to mean the letter that would say that the partnership could lawfully enter into the transaction. Thatis what you understood him to be talking about?

THE WITNESS: I understood all opinion letters to be that. In other words I may be wrong but to me an opinion letter is a statemen by counsel that says "Yes, this Party A can engage in a transaction legally with Party B" and I have had several transactions prior to this that I have personally been involved with that required opinion letters, and the limited scope of the ones I have seen, that's been what all of them said.

THE COURT: When Mr. Burak said no opinion letter, in a sense that was what he was saying --

THE WITNESS: He was saying he would not issue the letter so stating.

THE COURT: So stating?

THE WITNESS: Yes, sir.

THE COURT: All right, go ahead.

Q What did Mr. Burak's going forward with the transaction as an attorney for his client mean to you at the time?

A That whatever reservations his firm had were not based on the legality of the transaction. I find it hard to believe that an attorney who has factual evidence that something is illegal will allow his client to enter into it.

Q Did you think that was true about 15 other attorneys in the room?

THE COURT: Sustained. Sustained. This is what he thinks about what other people may have or may not have believed.

Q I believe you testified --

THE COURT: Mr. Muh, did you thknk Mr. Burak had changed his mind?

THE WITNESS: No, sir.

THE COURT: Did you think maybe there was some other consideration that Mr. Burak didn't stand up and say I was wrong, "Client go ahead and sign", did he?

THE WITNESS: No, I just felt there must have been other reasons that I am not aware of for his refusing. I should point out that one of the senior partners in that firm, Mr. Freund, had been involved in numerous discussions and negotiations with us, and at times Mr. Freund and I had not gotten along particularly well.

I just felt there might be other reasons that their firm just didn't want to be involved in this from any legal standpoint, period.

THE COURT: I see. All right.

When you say there were other reasons, you mean there were other reasons that Mr. Burak had for letting his client sign?

THE WITNESS: I thought there might be other reasons for them not wanting to be involved as a party, as a legal entity in this agreement.

THE COURT: They are the partnership's lawyer at that point?

THE WITNESS: That is correct and also counsel for the --

THE COURT: And coming to the closing charged with the duty of giving this letter?

THE WITNESS: That is correct.

THE COURT: The letter is expected of them by everybody, the letter is to come from the lawyers for the partnership who had presumably done the legal work to assure themselves that what they are saying is accurate.

THE WITNESS: I assume so.

THE COURT: Did you conclude that the reason they didn't give the letter was some reason other than the legality of the situation.

THE WITNESS: A number of possibilities went through my mind. I don't know if any of them are basis in fact. It dawned on me that they might not want to both be recommending to individual partners to sign the agreement and be the one to issue the opinion letter because they were in that -- they were in a bind, it seemed to me, that theywere then doing two different aspects of the transaction; and I just thought that they, some partners in the firm may have felt it was prudent for them not to have what might be viewed as a conflict. I am not sure. It didn't seem like a major problem when none of the other 15 lawyers came to rise to the occasion and say "Hey, gee whiz," it's something that I would have expected an attorney, and there were so many of them present from very fine firms, that if there had been real legal problems, it would have just been very logical that one of 15 attornys would say "Hey, what he is saying is this and we thought this."

It never came up. 15 attorneys listened to the same statement, 15 attorneys said "Let's go ahead, the opinion letter from Finley, Kumble, and we are telling our clients to sign."

And that was so overwhelming in my mind, that I really dismissed it, your Honor.

Q Did you think that at least one of these 15 attorneys, if he thought the transaction was illegal, from these fine firms in New York City, would have gotten up and walked out?

A Of course.

MR. SHAW: No further questions.

MR. GRUTMAN: Your Honor, Mr. Glatzer permitted me to ask six questions which is all that I have before he does.

RECROSS EXAMINATION

BY MR. GRUTMAN:

Q Mr. Muh,in the inquiry that was made of you by Mr. Mandel, you acknowledge the interest that you had in the prospective success of the deal for your own personal advantage.

Irrespective of that, and however interested you were in seeing the deal go through, did you in whatever participation you had in the deal, do anything which you knew was improper?

A Definitely not.

Q There were some questions asked concerning any conflict that existed between the interests of the persons who represented the new corporation and the partners.

Did you believe that there was any conflict between your interest and that of the general partners, the limited partners, and the subordinated lenders?

A Very broad open question. We had a common goal, a common interest, there were times,Mr. Grutman, during the negotiations that were serious negotiations on what I felt were relatively minor point compares to the scope of the entire transaction; then where there was an arm's length transaction and discussion between me or Mr. Risher and some of the general partners.

Q You remember at page 71 of the deposition fromwhich Mr. Mandel quoted that the following question after where he left off and making the following answers:

"Q And your interests and that of the general partners and the limitedpartners were adverse in the sense that in the negotiations the more you got the less they got and vice versa". You answered in 1972 "I really don't agree with that. The negotiations were all related to specifi points and not to intent. We all had a very common interest and that is to find out if there was a way for the firm to survive. Clearly that was my major interest, as it was for the other parties that you mentioned. So we all had the same interest and were all striving for the same goal."

Do you remember having made that answer to that question?

A Yes, sir.

Q Third question. Some reference was made to the Buckley settlement, and the time at which the Buckley settlement was consummated. May I have Exhibit 36, please?

(Handed to Mr. Grutman.)

Q I show you Exhibit 36 which is a letter to the Webster, Sheffield firm to the attention of Leland Cook, enclosing stipulations of settlement, form of general release, assignment of claims against Gross & Company under date of December 16, 1970.

Does that refresh your recollection that the substance of the Buckley settlement had been agreed on by December 16, 1970?

A It says that,Mr. Grutman. I have never seen the letter before.

Q Very well, thank you.

In the conversation which took place on January 15th, you made reference to the fact that somebody was talking about releases, and I invite your attention to the contents of Page 7 of Exhibit Triple F in evidence where it says alongisde of Mr. Persky's name "Corporation wants no litigation. Everybody should release one another."

Do you remember Mr. Persky making those conciliatory statements at the January 15th meeting?

MR. MANDEL: I object, no.

THE COURT: Sustained.

Q Do you remember Mr. Persky making the statement ascribed to him in Exhibit triple F in evidence?

A I remember it but I don't think it was that -- I am trying to remember which meeting. I do remember there were several occasions when Mr. Persky expressed an interest in reaching an amiable solution to these problems.

Q All right. Last question:

When his Honor interrupted Mr. Mandel's cross examination concerning what was said about litigation, he asked you the following question:

"If no deal, there would be litigation?"

You recall that inquiry from Judge Owen?

A Something to that effect, yes, sir.

Q What did you mean when you answered his Honor's question by saying yes? What deal were you referring to?

A The transfer agreement, the eventual transfer from the partnership.

Q You mean if there was no transfer there would be litigation?

A Yes. We had been told, I had been told --

Q Will you answer that question?

A Yes.

Q Who would be bring the litigation that you referred to?

A The limited partners, you know, through Messrs. Steefel and Richenthal.

Q And when you answered that if no deal there would be litigation, were you referring to suits that would be brought by the members of the prospective corporation against Gross?

THE COURT: Wait a minute. Wait a minute. This is a discussion.

MR.GRUTMAN: January 15th.

THE COURT: At Mr. Mandel's office.

MR. GRUTMAN: January 15th.

THE COURT: All right.

Let us get the witness' statement of this rather than yours.

MR. GRUTMAN Fine.

THE WITNESS: It was my understanding --

THE COURT: It is a question of what you heard said by Mr. Persky.

Q What did you hear said and what did you understand from what you heard said?

A That if the transfer did not go through, the approval, that we had all be told, Mr. Persky, myself, I believe Mr. Risher, by the limited partners, that they were going to bring an action to recover their financial losses, whatever they turned out to be, against Mr. Gross.

Q Because, Mr. Muh, if the transfer agreement didn't go through, would Newburger, Loeb go bankrupt?

A In my opinion, definitely.

MR. MANDEL: Objection.

THE COURT: Yes, sustained.

MR. GRUTMAN: No further questions.

THE COURT: Strike the answer.

MR. GRUTMAN: Why?

THE COURT: This is his addition, his addition to a conversation that has no bearing on the conversation.

MR. GRUTMAN: Just a moment. Let me make it clear then. In the conversation where litigation was mentioned.

THE COURT: No, Mr. Grutman, I understand Mr. Persky has said, according to his testimony that if there was no deal, then there would be litigation.

MR. GRUTMAN; Yes, that's what this witness has said.

THE COURT: That's what he said, Mr. Persky said.

MR. GRUTMAN: Correct.

THE COURT: Now although it stretches the rules of evidence a little bit, I permitted you to have him testify as to what he concluded Mr. Persky meant by the word deal although he is not in Persky's head, so having gotten that far, I stretched a point but I am certainly not going to then let you throw in some accounting knowledge of his.

MR. GRUTMAN: All right, very well.

THE COURT: -- to further what Mr. Persky had in mind.

MR. GRUTMAN: I understand.

BY MR. GRUTMAN::

Q Mr. Muh --

MR. MANDEL: Six questions, Mr. Grutman.

MR. GRUTMAN: You are right. I will sit down. I adhere to my representations.

REDIRECT EXAMINATION

BY MR. SILFEN:

Q Mr. Muh, you were present in the courtroom when Mr. Risher testified, were you not?

A For part of his testimony only.

Q Were y ou there for the part of testimony where Mr. Risher testified about Mr. Kayne's first involvement in the new corporation?

A I believe so, yes.

Q That's that part of Mr. Risher's testimony which talked about the New York Stock Exchange, is its insistence upon Mr. Kayne becoming involved and all those type of things?

A Yes.

Q Do you concur and adhere to the accuracy of Mr. Risher's testimony with respect to Mr. Kayne's first becoming involved in this corporation?

A Yes, sir.

Q Is it not a fact that Mr. Kayne was not present at all during the month of December during any of these negotiations?

A That is correct.

Q And was not present nor was Mr. Sloane present at the marathon session of December 30th-31st?

A That is correct.

Q Signed no documents to your knowledge on either of those dates?

A Correct.

Q Now you talked about, as I recall, some meetings that took place specifically on February 5th and February 8th.

Mr. Mandel ask you about certain specific meetings, and I believe you testified that at either one or both of those meetings there was some discussion about if the difference between Mr. Gross and some other people were reconciled there would be exchanges of releases.

A I believe that was discussed, yes, sir.

Q And I believe you intimated or testified that at those discussions there was somebody brought up the question of a release from Mr. Sloane and Mr. Kayne.

A What I do recall specifically was the subject of release among all the general partners. I don't remember that individuals were named but it was discussed that all general partners might if an agreement was reached, this might be one of the things to be added to it.

Q You knew at that time, did you not, that neither Mr. Kayne nor Mr. Sloane were general partners of Newburger, Loeb at this time?

A That is correct.

Q Did anybody bring up the subject of a release of the claims of Mr. Sloane and Mr. Kayne's against Mr. Gross as part of an overall package?

A I am not sure if Mr. Mandel raised it or not. He certainly made the expression that I heard him say that he felt that their claims were without merit and that he was not going to ascribe much money if anyone could deliver such a release but that's the only thing I remember being said about anything between Kayne and Sloane. I think it was Mr. Mandel who mentioned it.

Q Of course Kayne and Slaone were not present?

A They were not present at the meeting.

Q As I understand it there was no attorney present who was representing Mr. Ka-ne and Mr. Sloane in the action which you talked about being brought in California?

A That is correct.

Q Is it a fair statement to say that neither Mr. Kayne nor Mr. Sloane authorized either you or Mr. Persky, if you know, or Mr. Risher, to barter a release of their personal claims against Mr. Gross?

A I was certainly not authorized to do that. Never discussed it with them in that part. I don't know if -- I doubt it -- I dont know if they spoke to anyone else.

MR. SILFEN: I have no further questions

MR. MANDEL: I have one or two, just on this point. I don't know whether I should follow.

MR. GLATZER: Should I wait until Mr. Mandel goes?

THE COURT: Go ahead.

RECROSS EXAMINATION

BY MR. MANDEL:

Q You were in constant touch with Kayne during this period, right?

A Yes, sir.

Q And he was going to be an equal sharer with you in the new corporation, right?

A Yes, sir.

Q And you were very close friends?

A Yes, sir.

Q And he told you about his proposed litigation with Gross, you knew of it in advance, right?

A Yes, sir.

Q And you thought you had a pretty good idea of what Kayne was and was not willing to do?

A Pretty good idea is a fair statement.

Q All right. And when you testified that the deals would envision releases of all general partners, you weren't being technically restricking yourself to present general partners, you also included Gross who was in the process of withdrawal and Kayne and Slaone who were in the process of withdrawal, right?

A In that sense I assume I just thought in terms of releases from everybody.

MR. MANDEL: All right.

REDIRECT EXAMINATION

BY MR. GLATZER:

Q Mr. Muh,in January 1971 and in the first ten or 11 days of February 1971, to whom in terms of entities were the revenues of Newburger, Loeb being paid and by whom were the expenses being paid?

THE COURT: The partnership as opposed to the corporation.

A The partnership was still in existence.

Q It was receiving all the revenues?

A Yes, sir.

Q And it was paying all the expenses?

A It was paying its bills in the normal course of business.

Q You testified in response to Mr. Mandel's questions that you were running it for the benefit of the corporation?

A Any profit or loss that resulted from the operations of the period after December 30th would be absorbed by the acquiring corporation.

Q That was the only if, as and when?

A If, as and when it was a consummated transaction.

Q Did you do anything in January or February to diminish the assets of the partnership?

A On the contrary, it was certainly not in our interest to do that.

Q It was in your interest to do the best job you could?

A Absolutely.

Q What would have happened if the deal didn't close?

A The Exchange would have definitely suspended the firm.

MR. MANDEL: I object to that.

MR. SHAW: I think that is a proper question, your Honor. On the issue of motive.

MR. MANDEL: I withdraw the objection.

A The New York and American Stock Exchange would have suspended the firm and the notices of capital withdrawal would have become due I guess at various dates but would have all been due and of course all the revenues to the firm would have stopped because not being a member of any of the exchanges, the registered representatives would have had to go elsewhere and so you would have ended up with a partnership with significant liabilities, no ongoing business, and whatever legal actions other people would have to take would then be taken.

Q What would have happened to the corporation?

A It would have been dissolved.

MR.GLATZER: No further questions.

THE COURT: Thank you very much. We will stand in recess until 2.

(Luncheon recess.)

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AFTERNOON SESSION

2:00 p.m.

THE COURT: Mr. Silfen, who are you calling?

MR. SILFEN: Mr. Fred Kayne.

FRED KAYNE, called as a witness in his own behalf, having been first duly sworn, testified as follows:

DIRECT EXAMINATION

BY MR. SILFEN:

Q Mr. Kayne, how old are you?

A Thirty-seven.

Q What is your present marital status?

A Single.

Q Do you have any children?

A Two.

Q As I understand it, you are presently a widower?

A That is correct.

Q There has been some testimony and some mention during the course of this trial, Mr. Kayne, about the fact of the death of your wife and rather than prolong the trial or get involved in that issue at any other time, could you just tell us very, very briefly A, when your wife died, the extent of her illness, and keeping in mind being very, very brief on this issue?

A My wife died in March of 1974. She had been ill for about five or six years with failing kidneys.

In the spring or summer of 1970, we were told that her situation was getting progressively worse and that towards the end of the year she would need first, an operation on her heart and then eventually a kidney transplant.

In December of 1970 she entered the hospital for her heart operation, and the kidney transplant took place a couple of years later.

Q Could you just give the Cout a thumbnail history of your educational and business background up to the time that you first became associated with Newburger, Loeb?

A I graduated from MIT in 1960 as a graduate engineer in the industrial management program. After finishing the Army, my Army active duty, six months, I moved to California, and I went into the construction business. I worked for two different construction companies, and in 1966 I left the construction business to become a stockbroker.

I joined the firm of Francis I. duPont in 1966 as a stockbrokerage trainee, moved to New York for a short period of time, two, three months in their training program, and in January of 1967 I got my license as a registered representative stock broker with Francis I. duPont.

THE COURT: What year did you get out of MIT, Mr. Kayne?

THE WITNESS: 1960, your Honor.

A I worked for Francis I. duPont for almost the balance of that year until about November of 1967 at which time I joined Mc Donnell & Company as a registered representative in their Los Angeles office.

I worked there for Mc Donnell for two years, until their demise when they went out of business and I was with Shearson, Hammill & Co. who took over that office for approximately one month, or about two months, and then I joined Newburger, Loeb.

Q What is your present employment, Mr. Kane?

A I am presently the resident manager of Bear, Stearns & Company's Los Angeles office, I actually started the office and supervised the activities of about 40 people which include about twenty brokers.

Q When for the first time did you become employed by Newburger, Loeb, the partnership?

A About the middle of January 1970.

Q In what capacity were you so employed?

A As a registered representative.

Q And just to go through this shortly, you were employed in the California office?

A Yes, sir.

Q And did a time come, sir, after January of 1970 that you became a partner in the Newburger, Loeb partnership?

A Yes.

Q When did that take place?

A I became a partner as of February 28th, 1970.

Q Could you tell us briefly the circumstances under which you became a member of the Newburger, Loeb partnership?

A Well, as I testified earlier I was employed by McDonnell & Company in the fall of 1969, Mc Donnell & Company was failing, and I was introduced in the fall to severa members of Newburger, Loeb, partnership, met with them, subsequently visited with them in New York, Mr. Gross and several other members, and I became a member of the partnership.

Q At the time of your entry into the partnership, what was your partnership percentage and A, how much did you have to pay for that percentage or points?

A I became a 2 point holder in the partnership, two points is approximately equivalent to 2 percent, and each point holder was asked to put up $25,000 of capital for his -- for each point.

Q So that your capital investment was $50,000?

A That is correct.

Q At the time of your entry into the partnership did you in fact pay $50,000 to become a two point partner?

A I paid $25,000 at the time of my entry and $25,000 about five months later.

Q Could you tell tell us very briefly the source of the funds which you used to obtain your membership in the partnership?

A I borrowed the money from Bank of America.

Q All $50,000?

A Yes.

Q After your entry into the partnership did you continue to render services as a registered representative in the California office?

A Yes, that was my primary function.

Q And did a time come when you removed yourself from that office to the New York office?

A Yes.

Q When did that take place?

A Around the first of August.

Q Could you briefly tell the Court in chronological sequence the circumstances and facts which gave rise to your removing yourself from the California office to the New York office of Newburger, Loeb?

A Yes. About a relatively short time after becoming a partner, in April or -- early April, it first came to my attention and Mr. Sloane's attention in the partnership was suffering losses, rather large losses for a firm of our size on a monthly basis, and that the firm was not operating profitably since the beginning of the year. At that time we requested of Mr. Gross that we wished to both of us attend certain executive committee meetings of the firm and get more information, financial data on the current operations of the firm.

During May and June and July, early July, I believe, I attended two or three executive meetings of the firm, travelled back to New York and got some more -- got first-hand knowledge as best I could with what was reported at those meetings of the happenings of the firm.

This was pretty important to us because we were 3,000 miles away and we were spending 95 percent of our time embroiled in our own operations and myself on the West Coast.

It was after these series of meetings and after in particular returning from my July meeting that I became very concerned about the operations of the firm, the operations of the partnership, the management of the firm, and the direction everything was heading, and it was at that time that I decided to leave the firm and resign.

Q Mr. Kayne, can you place for us chronologically when for the first time did you ascertain that the partnership was in fact sufferint losses and not operating profitably?

A There was a party celebrating the opening of the office in early April, the -pening of the California office, and it was a very large party where we invited a thousand people from the community in Los Angeles, and it was after that party that Mr. Gross and myself and Mr. Sloane and one or two other people went out for cocktails, and I turned to Mr. Gross and asked him "How's the firm doing?"

I think he told me we lost -- to the best of his preliminary statements $200,000 in the month of March, and I had just become a two-point partner and I quickly calculated that, and figured I'd lose $4,000 in the month of March and I was quite surprised and concerned, that was the first time that I was aware of the firm's losses.

Q After that meeting, which I assume was in California?

A That is correct.

Q And you came to New York to -- to a few executive committee meetings thereafter during May, June and perhaps July, is that correct?

A Two or three meetings, yes, sir.

Q At those meetings or after the meetings did you have any further discussions or did you receive any additional information from either Mr. Gross or any other member of the partnership of and concerning the financial condition of the partnership during thatperiod of time, that is, June, July, and early -- sorry, May, June and July, early July of 1970?

A Yes, as a result of my basically conscious but unannounced decision to resign from the partnership, I began to be concerned about my client's accounts that I had brought into the firm, that had been -- and had their securities and their stocks had been transferred into the firm, and I was quite concerned about them,and their safety, because they had gone on my representations when I joined Newburger, Loeb and became a partner.

So I began to take the steps necessary to transfer out the securities of my clients, put them in their name, sit out credit balances. I had a lot of accounts, and this activity caused the partner in charge of the back office, Mr. Bob Therese, to see the securities being transferred out and the activity, and he called Mr. Sloane at that time in July, inquired of Mr. Sloane why all this activity, and I think Mr. Sloane told him that I was planning on resigning.

Within a day or two after that Mr. Therese and Mr. Frank flew out to California to meet with Mr. Sloane and myself. They came out late in the evening and spent practically an all-night session at the Century Plaza Hotel, which is right across the street from the office, meeting there, discussing with us and revealing as much as they knew about the partnership and the difficulties. It was at that time that Mr. Frank who was a lawyer, Mr. Therese having had an operations -- experience in operations in his brokerage firms, it was at that time that Mr. Frank told me that his interpretation of the partnership agreement was that I would be fully at risk, and that if I was to leave the firm and Mr. Sloane were to leave the firm with a substantial investment that the firm had made in California, that the firm's office in California would suffer a demise and that would probably be the death knell of the firm.

So my action would be contributing or helping to accelerate the demise of the firm, and that in any event I had exposure as a general partner and the guarantees to the limited partners, and he told me that there was no way that, in his interpretation, that I or Mr. Sloane could resign from the partnership, and leave without facting financial disaster.

Q Let me interrupt you for a minute, Mr. Kayne, if I may. Could you tell the Court if you know the net commission income that you received as a registered representative for the three-year period prior to the time that you became a registered representative at Newburger, Loeb, and if you can do it on an annual basis, that would be helpful.

A You mean my earnings?

Q Net commission earnings from other employments other than Newburger, Loeb as a registered representative.

A In 1967 I believe I earned as a stockbroker about $35,000, my earnings. In 1968, in excess of a hundred thousand dollars, between a hundred and a hundred ten. 1969, between 100 and 140, say 125 to 140,000. 19 -- those were the three years preceding my employment there.

Q If you know, how did your production as a registered representative for those periods of time compare with other registered representatives of the firms that you were working for?

A Well, my first year with duPont was my first year in business, I don't think that is a very good comparison.

I would say that with my years with McDonnell & Co., I'd say that put me in the top five or ten brokers in the firm of several hundred people, three, four hundred brokers.

Q Do you know at whose instance the meeting with Mr. Therese and Mr. Frank was called?

A Mr. Therese and Mr. Frank, they wanted the meeting. They wanted to come out and talk to Sloane and myself.

Q Can you fix a date or approximate date in July when this meeting took place?

A Best I can fix is somewhere after the executive committee which I htink was probably in the -- after the 15th and before the 20th of July, from the 15th to the 20th would be the best I can do.

Q Had you, as of the time of this meeting, if you recall, paid in your entire $50,000?

A No, I paid in the 25,000.

Q When did you pay in the additional 25,000 if you recall?

A Just prior to my coming to New York the last day of July. I felt that if I was coming to New York and going to be taking on management responsibilities and urging others to roll up their sleeves and get to work, that I had to show as smuch good faith as I could, and so I went to the bank and borrowed anotehr $25,000, put it in the firm at the end of July; prior to my coming to New York.

Q Do you have a recollection, Mr. Kayne, of what it is Mr. Frank and Mr. Therese told you about the problems existing in the partnership as of the time of this meeting?

A Yes, without being specific because it was a long meeting and the years have fuzzed the specifics, but generally the firm was losing money at an alarming rate, and even though some minor cost cutting had been done in the early spring, they were concerned that these losses just were not being stopped. They were concerned about losses in revenues and high, you know, fixed expenses. They were concerned about the capital of the firm. It was being eroded at a very quick rate.

They talked about the lack of management, the lack of financial supervision, the lack of reporting systems, the lack of controls, and they were concerned about the lack of leadership. They felt that they weren't getting the information they wanted, and they were concerned about the whole lack of leadership in the firm.

They had talked about -- I think the main focus of that meeting was to stress upon Sloane and myself as far as they were concerned that we were all in this together, that they were -- that Therese had become a new partner when we became a partner, and that it would be most helpful if we would stay and try to help fight the battles.

Q When you went back east to these executive committee meetings prior to this meeting at Century City, do you have any recollection of discussions which took place at those meetings of and concerning the problems of the partnership other than the problems thatyou just related to us which were conveyed to you by either Theresa or Mr. Frank?

A It is the same kind of discussions would come up in those meetings, but they weren't as alarming. They were taken as a matter of fact. "Yes, we'll do something about it. We have a problem, let's assign it to someone, let's do something about it."

Even some of the minutes of those meetings should reflect that both Sloane and I requested more financial information, better financial information, kept abreast of what's doing, and some reflection in reviewing those meetings, minutes of the meetings that there was talk about minor cuts and acuts in some costs but there was no urgency to any of this during those meetings.

Q You mentioned you made ready reference to Mr. Sloane. Perhaps it would beappropriate just to identify Mr. Sloane's role in the California office, if you know.

A Mr. Sloane was the -- was the manager of the offic he was in charge of all the people, and he was responsible for supervising my activities as a registered representative as well as all the other brokers in the office.

Q How many brokers were there in the office at this time reference? That is, let's say in the spring, early summer of 1970?

A Say 15.

Q Now, would you continue to tell us about what transpired at the Century Plaza meeting?

A Well, I didn't know, other than being pretty scared about hearing all this stuff, as completely as totally as was being presented to us, I didn't really know where we were going to go with this, I was very confused because I had made up my mind pretty much the week before to resign, and now hewas being pointed out to me by Frank that the -- that my resignation would help to accelerate the demise of the firm and also to --that my resignation would not put me free of the problems of permanent jeopardy and financial structure.

So we discussed what we could possibly do, and Frank and Therese said that I think we broke up and we went and took a break, and Sloane and I went away. We all took a shower, I think. And came back for breakfast, and said "Well, what do you suggest?"

And Ned and Bob said -- or N[illegible] -- I don't remember which of the two -- said "We really need some new faces in New York. We are basically incapable of moving forward."

And I don't know how it came about, or what exactly was the format, but it was decided that one of us, Sloane or Kayne, should go back to New York on a first-hand basis. I voted for Sloane, he voted for me, and ended up offering my services to go back to New York on a first name basis. However, I put one or two conditions on it. I said that it had to be completely amicable, and I said that the -- it had to be in a manner which provided a working basis for decisions to be done through the firm. My reading of the firm's partnership agreement showed me that the executive committee ran the firm, and I had to have an executive committee that would be responsive to the new -- new way the firm was going to go.

Now, when I was asked to go back, when one of us were asked to go back by Frank and Therese, my first reaction was "Well, how does -- how do you go back? And isn't it presumptuous to think that we would be -- you know, be involved in running the firm?"

And they went on that there was such a void in management in New York that if -- that they thought that the management back in New York would welcome a new face; and that's basically how it came about that it evolved that my name was thrown into the hat, to go back to New York.

Q When the meeting terminated I assume that Mr. Therese and Mr. Frank did return to New York?

A Yes.

Q And what happened next in terms of chronology as far as any communication between any of the New York partners and either yourself or Mr. Sloane regarding discussions that took place with Mr. Therese and Mr. Frank about you going back to New York?

A Well, the best I can recall, the next time I talked to one of the other of them, they had said that they had had a discussion, they brought Jim Settel into the discussion. Jim Settel was another young smaller partner of the firm although he had been at Newburger, Loeb for 13, 14 years, and he was a good personal friend of Charles Gross. And they brought Jim Settel into the discussion, explained to him what our -- the meeting had been about in California, and asked Jim Settel to call Charles Gross and present the idea to him of Charles Gross stepping down as managing partner and myself taking his place.

It was reported to me that, by as I say either

Ned or Bob, Ned Frank or Bob Therese, that such a discussion had taken place, and that in fact Charles Gross was willing to discuss it, and that we should come to New York, and have a meeting with him and discuss it.

Q And that meeting as I understand it or it has been testified to took place at the Hotel Navarro?

A As best as I can recall.

Q You were present?

A I was present at the meetint but I don't recall if it was at the -- yes, the exact hotel.

Q Mr. Gross was present?

A Yes.

Q Other members of the New York partnership were present?

A Yes.

Q Mr. Sloane was present?

A Yes.

Q Will you tell the jury your best recollection of what went on at that meeting with specific emphasis, if you can recall, on who said what to whom?

A I don't recall who said what to whom. All I recall is the general tenor of the meeting was to meet and discuss the replacement of Gorss by Kayne as managing partner.

The meeting was handled by Settel and Ned Frank and talking to Gross, asked him if he wouldn't step down as managing partner. He said that he would, and that co-incident with that he had decided the week even before, the week before, I don't recall, that he wasn't making the kind of progress that he wanted to, that the firm was suffering the losses, and he was just tired, and he was amicable to some kind of transfer of authority.

He said that he had had an investment in the firm and wanted to do anything he could to protect it, be as helpful as he could, and that -- so that was fairly amicable.

I mean there was no -- there was an animosity or any ill feeling in that meeting at all.

Later after the meeting downstairs Mr. Frank and Mr. Gross at dinner got into a -- some animosity. The only other thing that I recall at that meeting was that Mr. Gross felt that he wanted a -- at the -- I heard the term here used in the testimony as a face-saving device a period of time of -- for the transformation of my going out his going out as managing partner and my coming in as managing partner, so ir was agreed there that I would come to New York as assistant managing partner. It was also agreed at that meeting that I would only come back to

New York as assistant managing partner with the understanding I would become managing partner if and when Mr. Gross and the other members at that meeting who were the New York partners succeeded in changing the executive committee to include a broader representation of partners.

Q Did you return to California after this meeting at the Hotel Navarro?

A Yes. I think I went back that next day.

Q What next transpired, if you can recall, between the termination of that meeting, and your coming to New York to assume the title as assistant managing partner?

A I think the executive committee did get changed in fact and broader representation was given to all the partners, and the other action I took, other than the personal actions getting ready to come to New York, were that I wrote letters to the various department heads, telling them that I was coming to New York, and that I wanted to meet with them, and if they would list their five major problems that they felt they had, five most serious questions in their mind, if I could meet with them each I could in my own mind I felt that would bring me up to date on the problems of the corporation that much quicker.

I wrote about ten letters of that sort.

Q There has been some testimony in this case already about the firm of Risher, Muh & Company, Inc. While you were in California but before you came to New York, did you contact Mr. Muh?

A Yes, I did, As I went back on the plane from Navarro -- or that hotel meeting, Navarro Hotel, I perceived that the main problem I was going to have coming back to New York and getting involved in the problems and in the solutions was identifying what the problems were, and it had been clear to me tht with financial controls almost non existent in the firm, financial information, that I needed some more hands and arms and intelligent people.

I had kept contact with Bob a couple of times we had lunch when I had been in New York previously. So I called up Bob and I asked him if he and his partner were available timewise, and if they were, could they allow their full time to be spent on the Newburger, Loeb, on helping me get into the situation at Newburger, Loeb and helping identify the areas of problems.

I at the same time on the plane identified that I wanted to do the same thing with Peat, Marwick, who were the independent auditors of the firm, and so the day after I got back to New York, I got hold of -- I got to New York; I think it was August 3rd or 4th, I got hold of the partner in charge of Peat, Marwick and asked him to do some work for the firm.

Q What steps did you take if any to arrange for the employment or engagement by Risher, Muh & Co., Inc.?

A I talked to them and asked them if they would be available, and that they -- they said yes; and I told them that based on the consent of the other members of the executive committee when I got to New York, I would like to retain them fully and would they clear their schedules and when I got to New York would they meet with me right away and wewould get into some of the problem solving or problem identifying.

Q Did the time come when you obtained the approval or consent of the executive committee to retain the services of Risher, Muh, Inc.?

A Yes.

Q You got to New York as I understand it on August 3rd; is that correct?

A Yes.

Q Did you from that time forward assume the title and duties, responsibilities of assisting managing partner?

A Yes, it was a -- there never had been such a post before so it was just a new title created as a -- for that 30-day period.

Q Could you tell the Court whatyou did, what you found, and all steps that you took, let's say, beginning from the time that you became the assistant managing partner up to August 24, 1970?

A Well, in the first few days at the firm, I had to familiarize myself with just who the people were, so I first went around an introduced myself to the people.

I met with these various department heads, there were ten or twelve of them. I set up a rather rigid schedule and went over with them and had them make a presentation to me of what their problems were. So the first week was essentially just meeting people and identifying who was who. We had anywhere from three to four hundred people working in the firm, only 40 in the California office.

There were 120 people upstairs in just the clearing operation alone and four offices in New York of brokers, so I had to get out and meet everybody.

I stood up and introduced myself and the -- in front of the brokers at 72nd Street, and they had gotten letters that Mr. Gross had sent out -- saying who Kayne was and now they had to see him in person and get involved and hear him talk and tell them what we were going to do.

There was a tremendous demoralized effect in the firm because everybody was aware that business was bad, and things were not going well, and you just don't keep problems a secret. So in the first week it was mostly -- first week or two weeks was mostly a people-meeting thing, both department heads and employees through the firm, walking around and talking to people.

After a couple of days, first two days there I went over to the New York Stock Exchange and introduced myself.

If I had any ego about being managing partner when I came to the firm that was quickly dispelled in the first two days because they asked me what we were going to do to get more capital in the firm and they really laid down the -- a heavy hand on me at the first meeting. I tried to please; that I was a new person at the firm and they didn't want to give me any time to understand anything, just what are the solutions to the problems.

We had a back-office operation upstairs that looked to me like there were just a hundred people wandering around and I was very, very concerned about, you know, the controls on this whole area. We owed somewhere between 13 and 15 million dollars to banks, so I thought it was appropriate that I go meet the banks.

So I hd Andy Newburger set up, who was, I guess, partner in charge of bank liaison, set up a meeting, and I went and visited everyone of these 13 banks; and that took, you know, a half hour to an hour apiece.

With Muh and Risher I was able to work with them and assign them areas of specific responsibility to research and then to move forward on. I believe it's been testified earlier what they did. One of the major problems of coming into a situation new is identifying who is capable and who is not capable , so the coping with the people problem was my major task that first two to three weeks.

Then, as the intensity of the New York Stock Exchange increased I had to cope with that, and when it became apparent that we had to get out of the clearing business, that became a -- of tremendous urgency and in fact by August 25th, through Paul Risher's skill we were able to effect a clearing agreement. As he testified it was the largest clearing agreement on Wall Street. There was over a hundred million dollars worth of securities in the vaults of Newburger, Loeb and we owed customers -- had debit balances in excess of 25 million, I stated there were $13 million worth of bank loans, and we were also clearing for four or five other brokerage firms at the time.

So it was important that this not be left -- that our customers not be left vulnerable or there would be just a tremendous, tremendous problem. And that's happened already in Wall Street in many, many other firms, including Mc Donnell & Company, which had to go through a liquidation and customers got tied up for great periods of time.

So by August 25th we negotiated this agreement with W.E. Hutton & Company. By the end of September every customer was transferred out and was intact. Incumbent upon that were legal agreements involved, getting -- then we had to do something else that was never done before in the New York Stock Exchange which was W.E. Hutton didn't have enough money to take all these customer accounts, they didn't have enough capital so we took some of our capital and actually subordinated it to W.E. Hutton & Company. That was the first time that a member firm had subordinated something to another member firm.

So the problems were just coming fast and furious. My particular area was people. I had to find out who was doing what, and who was capable and who was not capable, and then later -- so that's where -- that's in broad generalities the best I can do.

Q Did a time come when you assumed the position of managing partner?

A Yes, on August 11, 1970.

Q Do you recall the circumstances under which that took place?

A Yes, I believe it was at a member -- at an executive committee meeting; and Charles Gross in the middle or the end of that meeting or in the meeting just resigned and I became managing partner.

Q Did a time come, Mr. Kayne, when you received, in your capacity as managing partner, and the executive committee,a report from Risher, Muh & Company, Inc.?

A Yes, I did.

Q I believe you were here during Mr. Muh's testimony when additional defendant on counterclaims Kayne's Exhibit J was introduced in evidence and I show you that document, and ask you you whether or not that was the report which youhad received from that company.

A Yes.

Q What steps did you take if any any or what did you do after you received a copy of that report?

A First I read it, and then I distributed it to all the members of the executive committee at a meeting that was held on August 24th, and then we all set about trying to implement some of the problems and to implement an action to solfe some of the problems that were highlighted in this report.

Q You said something about a meeting on August 24th, 1970.

A Yes.

Q Let me show you other exhibits which have now been marked in evidence and ask you whether or not you are familiar with these exhibits. And they are additional Defendant Exhibit D in evidence which is the agenda of the executive committee meeting of August 24, 1970, Exhibit E, which is a letter dated August 21, 1970, to the New York Stock Exchange, and Defendant Exhibit A in evidence which is your remarks to the executive committee of August 24, 1970.

Now, Mr. Kayne, are you familiar with those three documents?

A Yes, I am.

Q Who prepared the agenda for that meeting, if you know?

A I did.

Q Other than Mr. Risher and Mr. Muh's report of August 21st, what other information was made available to you if any, which you utilized in preparation of the agenda for August 24, 1970?

A Well, through my preliminary work, as I said I retained the firm of Peat Marwick to come in as independent -- our independent auditors to come in and tell me as best they could in a real short period of time how much money we had in the firm, and take a look at that compared with what our internal figures were and what the figures were that had been reporting to the New York Stock Exchange.

So it quickly became apparent from my meetings with them that in fact many, many partners were in capital deficit, so far as I could say I used their report and their meetings and other financial data that I had seen to come to the conclusion that we had a significant problem with partners being in deficit and therefore there was no capital there from those partners. In fact they owed money to the firm. So that led me to my -- what I always considered my most key item, which was trying to get that money that the partners owed to the firm paid into the firm; and I used that as the -- that information as the basis for my proposals of assignment of tax refund and distributing of assignments.

The next thing I found out from other partners is that there never really had been a meeting of the partnership in almost a year where all the partners got to go and had disclosure, so I decided that it was very important to have a full disclosure meeting for all the partners and tell them as much as I knew, or as much as any other member of the executive committee knew, and make -- just tell it like it was to them.

So I scheduled that meeting on September 3rd. You want me to go on with some of these other items?

Q I am only interested in your discussion regarding the items which appear on the agenda or as part of your prepared statement to the executive committee on August 24, 1970, particularly the source of your information.

A Well, Item C on the agenda is the proposal, "Become a non-clearing firm."We had been in active discussions with many firms on Wall Street and were in the serious throes of last discussions with W.E. Hutton, so from personal knowledge of having met with the senior management of Hutton, having been in preliminarily on some of the drafting of documents, I put that on the agenda. I felt that was a major change in the firm, and therefore the -- I wanted it to be highlighted on the agenda and everybody to vote on it.

The One New York Plaza lease, I had attended meetings with three different law firms on the One New York Plaza lease, having gotten a copy of the lease myself when I realized how big a space we had was sitting empty over there, and I looked at the lease myself, and then I actually retained two other law firms to review the lease and to advise, to help advise the partnership on how to go about -- whether or not there was any way to break the lease, and so --

Q Let me ask you this question, Mr. Kayne, if you know:

Who were the existing counsel to the partnership at this time, that is, in August of 1970?

A Golenbock & Barell.

Q Had you had any meetings with Messrs. Golenbock & Barell of and concerning notice of the items which appear on the agenda of Ocrober 24th, prior to the date of that meeting?

A Yes.

Q Could you tell the Court about the meeting or meetings and what was the subject matter and what came out as a result of that meeting or meetings?

A I had one meeting with Golenbock & Barell with regard to the basketball team. They were the attorneys, as I recall, on the syndication of the team, and I was -- my particular question as I recall was how, when we were doing a syndication and Newburger, Loeb was supposed to act as a broker on the team, did Newburger, Loeb end up owning the team, and what kind of paper work and protections had they done, or what was the genesis of the problem, and how did Newburger, Loeb get into that predicament; and we had some general discussion about that. I then subsequently met with them, it was either prior or subsequently, I am not sure, during that period, with them, specifically on the One New York Plaza lease, in which they -- we had a meeting where I went down with two of Ned Frank and with Andy Newburger, met with three of the people there at Golenbock & Barell and had a two-hour meeting on that lease. It came to my attention at that meeting that there had been an escape clause from the lease in April, that could have been -- everybody in that room it appeared that that had been overlooked; and that the partnership could indeed have gotten out of that deal at that time, so it was at that meeting that I made up my mind that I better get some other attorneys to look at this lease, and to give some other opinions.

I also -- both Ned Frank and myself were unhappy with the opinion that Golenbock & Barell told us to take with regard to that lease. That was one of essentially -- well, you want me to go into that?

Q No, I don't think it is necessary.

Do you redall the name or names of any of the othe two law firms that you went to visit?

A Yes, I visited with Finley, Kumble. I met there with a fellow by the name of Don Zimmerman and a fellow by the name of Neil Underberger, both of whom were partners of Finley, Kumble. I had gotten to that firm, been introduced to them by Bob Muh, and I met with them specifically along with I believe again Andy Newburger and -- Andy Newburger was involved in leases as well as banks, and so I went with him to the meeting, and he -- we talked with them and asked them to read the lease and give us their opinion of how we could get out of this lease.

The third firm was recommended to us by Ned Frank's father, who was a judge, and the judge recommended using a particular lawyer in a law firm who was, he felt, had done some outstanding work in front of him with regard to leases, so we went over and visited this fellow, and I have never been able to recall the fellow's name although we did get a bill from him later on and I did have a subsequent meeting with him afterwards on what his views on the lease were.

So we met with those three attorneys.

It was as a result of what I thought was -- as a result of these series of meetings both on the basketba and on the lease, the whole lease episode and my meetings in that regard, and that I thought I should -- we should have a new fresh independent law firm, that had no tie-ins to anybody at the partnership, and so I at that time put on the termination of the retainer agreement with

Golenbock & Barell.

Q On the agenda?

A On the agenda.

Those are the primary major items on the agenda and I wanted to make sure every one of these were highlighted as well as any new business or old business that anybody would bring up.

Q There are two other exhibits which are seated before you, and they are your prepared remarks to the executive committee, which is Defendants' S, and your letter of August 21, 1970, to the New York Stock Exchange, which is additional Defendant Kayne's Exhibit E.

Directing your attention first to E, which is the letter, do you recall writing that letter, Mr. Kayne?

A Yes, I do.

Q Could you tell us the circumstances which gave rise to your writing that letter?

A Well, as I testified earlier, I went over and introduced myself to the Exchange somewhere in the first week I was in New York, and they asked me to -- what we were going to do with some of the problems we had.

I told them a little bit about my background, told them I was just a new assisting managing partner and

I didn't have any answers for them.

On August 11th when Mr. Gross resigned, we informed the Exchange promptly of his resignation, and as a result of that resignation and that notice to the Exchange, I was asked to come over to the Exchange, meet with them, and we met on August 13th.

They wanted to know what we were going to do to improve our capital position and to stop the hemorrhaging that was going on in the firm in terms of our losses, and I wrote this letter to outline to them that we were on an action program, and that we were indeed very aware of the problems and that we were taking steps to try to cope with them.

Q With respect to the prepared remarks you made at the meeting, Mr. Kayne, can you tell us the circumstances which brought about the preparation of this prepared statement?

A Well, I had been in New York about three weeks, things were worse than I had been told at the end of July in the meeting with Frank and Therese, and I was concerned from several standpoints. First I was concerned that were taking -- that I had uncovered a real bag of worms here in terms of operations, controls, and the way the business was being run. I was concerned that anything I did going forward and taking actions of a major nature, such as I had put on this agenda, without revealing to everybdoy the bag of worms, would mean that some day later on somebody could come back and say "Well, he never told us abou all these things" and I might be tied in to all the things that were discovered, because I, at that time, felt in late August that there was a reasonable probability that the partnership was going to go broke and go out of business.

So what I was concerned about was getting the record clear as to a starting point and stopping point of some of these problems.

Second, I wanted to make everybody aware of the seriousness of the problems, because a lot of the partners just didn't seem to be aware how serious things were.

Third, I wanted to, I felt, after uncovering a lot of the things and seeing the capital position of the firm, especially the area of the deficits, and seeing Peat, Marwick tracing the capital account, that in fact when I had joined the firm on February 28th that the capital that was represented in the partnership agreement was not there, and there were many partners in deficit at that time.

So it appeared to me in August that I had been given a misrepresentation when I joined the partnership. Because of that, I felt that at some later time, I might have to take action, both to either recover my money or to protect myself in some way, as time went on, and as I said, there was a real probability that there could be financial duress in this partnership, that everything would not be saved, and you know, and what have have you.

So with combining all these things I wanted to make a statement for the record that I have been here three weeks in New York, here is what I have found, and I wanted to preserve what rights I had, and by my omission not to do anything at that time, not to forego anything that I might have covered.

Now, I wanted to also do so in a spirit of cooperation and moving forward and trying to solve the problems. I didn't want to file any lawsuits or get into accusatory kinds of things.

So if you -- so in my remarks I was very careful not to metion any names and be either slanderous or accusatory on a specific basis.

I mentioned problem areas, I went over the areas, and I did it as carefully as I could, not to be -- to personalize these remarks.

Later it was brought to my attention that certain people in the room, when they heard the situation described, and they fit themselves into the situation, felt that I was accusatory to them but I was specific in preparing this not to be zeroing in on any one person.

Q That executive committee meeting took place on August 24, 1970. Let me show you Defendant's Exhibit XXX in evidence, teh second sheet of that exhibit, and ask you whether or not you are familiar or have any personal knowledge about that document, which is dated August 24, 1970.

A Yes, I have seen this document before.

Q You have seen that before?

A Yes.

Q Mr. Kayne, could you tell the Court your knowledge of that document and what you know about it and when you saw it and the circumstances under which you saw it?

A This letter of August 24th refers to a list of warrants that were discussed, list of warrants and some shares of stock, that were discussed very briefly at an early executive committee meeting on August 11th in which certain of the senior partners of the firm asserted that they had an interest in these warrants and in their stock and it was really their property to the exclusion of the other partners in the firm, that they had received them at a certain time, and they asserted it was their property.

This was a very busy meeting, everybody concurred in that view, and we went to other business.

Shortly after, and I think it was after this August 24th meeting, as best I can recall, Ned Frank came to me and said in essence, "I think that a mistake was made at th August 11th meeting and that we should not have approved this distribution of warrants to any individual partners, that it is the property of all the partners."

Q Mr. Mandel is inquiring as to whether you can fi a time for this discussion with Mr. Frank.

A Yes, I think it was after August 24th. It was a couple of weeks later. And said that this is a -- his interpretation of this, and I think it was because he was the legal partner in the firm at that time, the partner in charge of compliance and legal matters, and I think Bob Stern or one of the other partners had come to him to implement the breaking down of these warrants into the different people's accounts. I think that's what prompted Ned to come to take a good look at this and then to come to me with his views.

And his views were that these warrants were an asset of the whole firm, and that -- and he used the example with me at that time that there were other things that had been in the '69 partnership that when the '70 partnership was the successor partnership had taken things that there were losses later on, and I believe he used the example of the Tyco warrants, and other assets, and it was his view that the distribution of these to six or seven partners was illegal, or eight partners, was illegal.

To me at that time it seemed of small import because none of these warrants had any value, in August; so I said to him "Go speak to Bob Stern, because I happen to have met with Bob Stern half a dozen times, and I happen to think he is a very honest guy."

I said "Go to Bob Stern and discuss your views, and, you know, you take care of this." That's the last time that I ever heard from any partner at all about the Geon warrants or any of the other warrants in this matter until the litigation.

Q You told us before about the transfer of a large quantity of securities out of Newburger, Loeb's vaults over to W.E. Hutton. Did Newburger, Loeb had any vaults other than on the premises of Newburger, Loeb, if you know?

A To my knowledge, when I went around to those banks with Andy Newburger, he told me that -- I asked him who are our lead banks. He told me First National City --and Chase Manhattan Bank.

And I had asked him -- so to my knowledge they did have other vaults, yes.

Q After the August 24, 1970 executive committee meeting, Mr. Kayne, did yoiuhave any contacts with Charles Gross, let's say, during the period of August 24th up to and including September 3rd?

A Yes, I did.

Q Would you tell us about those?

A Well, on the last day of August, Charles Gross asked me to go, I believe, to lunch with him or for a drink at the Coachman across the street, restuarant right across the street from our office. And at lunch he pulled out some typed letters and handed me his resignation from the partnership, told me he had done so with the New York Stock Exchange and American Stock Exchange, and after I got over -- that was the meeting I had.

Q Is that the full extent of what took place at that meeting?

A Well, no, after I got over my initial shock of that resignation coming in, we -- I told him that as far as I was concerned -- well, I thought what he was doing was wrong, that he had not -- he was not dealing in good faith here, and I thought he was wrong, and it was -- I wanted him to consider and withdraw his resignations.

I went into his discussion about it -- our meetings and his representations at the end of July to stay in. I went into the point that he was a very central kind of figure in the partnership in that he had brought in some of the limited partners and subordinated lenders, and if he withdrew, other people would probably withdraw.

I brought in just the whole idea of good faith, that he had brought me into the partnership, now he was getting out ahead of me, and I didn't like that. And that took part of the meeting. The last part of the meeting was when I told Gross that --

THE COURT: Mr. Kayne, you say he hadgotten you into it? You are giving me specific testimony about him getting you into it. Was such given?

MR. GRUTMAN: Yes.

MR. SILFEN: It was given, your Honor, if I may say, through Mr. Gross' testimony when I asked him.

THE COURT: Yes, but not from their gentleman here.

MR. SILFEN: Not from Mr. Kayne, from Mr. Gross.

THE COURT: Not from Mr. Kayne, all right.

MR. MANDEL: I am sorry, I may have missed this. Mr. Gross never discussed this lunch?

MR. SILFTEN: No, no, getting into the partnership. The judge is inquiring about coming into the partnership.

MR. MANDEL: Yes, Mr. Gross did testify about that.

THE COURT: Ihave the terms under which he came in but not how it came to pass, and you did not mention that Mr. Gross brought you in.

MR. SILFTEN: That came through Mr. Gross' testimony. I thought it would be duplicative, your Honor, so that's why I bypassed it.

THE COURT: Very good.

A The last part of that meeting was essentially just one of trying to finish lunch, and I said "I can't understand why anybody would create a vehicle such as a partnership where people can take their money and take it in and pull it out and push it in as they see fit, and you have no permanent capital base to affirm."

And Charley said then that that certainly will be paramount in his mind and even at the end of the year, and before creating this partnership he had tried to create a corporate form of the firm, and in that way, you know, the capital stays in the firm as a permanent basic capital, so that was essentially the whole meeting, those three areas, and the lunch.

Q Now you had mentioned to us before, I asked you about this August 31st lunch, the September 3rd meeting. Do you recall that, Mr. Kayne, that there was a meeting of the general partners on September 3rd?

A Yes, I do.

Q Do you recall what happened at that meeting?

A We had almost every general partner there that I know of, and we went through a complete recitation of, as best I was able, of problem by problem in the firm and telling everybody that here is the situation as we stand now. I also announced to everybody that hadn't heard that Charles Gross ahd resigned. We went over the fact that these were trying times and that everybody had to lean together and try to help, and that it was important to work harder than ever in terms of trying to bring in revenues.

We discussed in particular the areas of major concern in the firm which were capital and capital withdrawals, we told what I did with the assignments and was hoping that with the lead of the major partners in the firm who were in major capital deficits, people like Andy Newburger and Stern, Bob Stern, that if those people would make up their deficits, then all of the lesser partners who were in deficit would please follow their lead.

We talked at some length about the clearing agreement, and then we had a question and answer period and the opportunity for anybody in the partnership to bring up anything that they might have on their mind.

Q Let me show you what has been marked as Defendant's Exhibit PPP in evidence, which purports to be the written notes of Richard Stern at that meeting and direct your attention to next to the last page of those notes on the bottom beginning with the word "afterward," and ask you whether you have any personal knowledge of Mr. Stern's notes.

MR. MANDEL: Excuse me a second. Does your Honor have a copy of this?

THE COURT: I don't.

MR. MANDEL: It may help to follow this testimony which will otherwise be cryptic.

(Document handed to Court.)

THE COURT: Is this the only copy you have?

MR. MANDEL: I don't need it.

THE COURT: Go ahead.

Q Do you see those notes, Mr. Kayne?

A Yes. You are talking about the part down here that says "afterward" and then parenthesis.

Q That is right.

A I don't recall this.

Q Do you recall such a meeting?

A You mean --

Q Such a discussion between yourself, Mr. Persky, Mr. Stern?

A No, I don't. There must have been 30 people at the meeting, 25 or 30 people. I don't recall the four of us getting together and discussing it.

Q Do you see the reference to the word "Game Plan", contains "Game Plan"?

A Yes, I do.

Q Does that phrase "Game Plan" have any meaning to you?

A No.

Q Did you ever use that word "Game Plan" at either the September 3rd meeting or at any meeting afterwards in the presence of Mr. Persky or Mr. Stern or Mr. Frank?

A I don't recall.

Q Is that phrase part of your vocabulary?

A Yes.

Q Did you have a game plan for Newburger, Loeb, the partnership?

A Yes, I think I did.

Q What was your game plan in terms of partnership?

A At that time?

Q At that time.

A My game plan at that time was to try to keep the capital in, and try to attract new capital. It was very important -- Newburger, Loeb had a substantial basic capital. The problem is it was all been withdrawn. The subordinated lenders all wanted their money out, limited partners all wanted their money out, so there were significant notices of withdrawal already in from the limited partners. This was showing up already in Risher, Muh's report that major capical was already on notice of withdrawal. The capital pressures were relieved by going into the non-clearing business, but with Gross' resignation, with other limited partners that were talking about resigning and that I felt were going to be resigning from Gross' resignation, it became apparent that all the capital that was in the firm was fleeing. So it was important to me to try to keep that capital intact and try to keep it in the firm.

Second, it seemed to me that it was important to try to get the capital that was owed to the firm paid in, and we had, it's been testified here on and on, that there were people in capital deficit in excess of a million dollars. That number wasn't known then in August but it was a large number and that was in.

Third of all, if we could sell the basketball team, the borrowing power that all those partners other than myself and some of the other partners had signed on, they had signed for a million, $2 million worth of liabilities. If that could be released maybe these guys would then come in with their tax refunds or some of the -- some borrowing power to put in the partnership.

All all in all if we could keep the money from going out, if we could get the money coming in from the people that owed it, and then third, if I could go out and meet with new people that might want to bring two things to the partnership, one money, and the other one management ability, then I think that that was the way to go, and that I felt was my major responsibility at that time. At the end of August through the month of September, it was get -- pay attentionto capital.

Q You talked about the latter part of your conversation with Mr. Gross at the luncheon of August 31, 1970 when t here was a discussion about corporate structure. Did a time come, Mr. Kayne, when you conceived of an idea tochange the sttructure from the Newburger, Loeb partnership to some other form?

A Yes, there did.

Q When did that take place, if you can recall?

A Some time in September.

Q Let me show you a document which has been marked in evidence as additional Defendant Kayne Exhibit H, and ask you whether or not this document is the plan which you prepared.

A Yes, it is.

THE COURT: Whose notes are triple P?

MR. GRUTMAN: Richard Stern.

MR. MANDEL: Richard Stern, one of the additional defendants, a general partner.

THE COURT: Mr. Kayne, if I can address your attention to PPP for a minute here, you see that it says that it purports to describe a meeting at which you were present.

THE WITNESS: Yes, sir.

THE COURT: And it purports to, I take it this is relatively contemporaneously with that meeting, it indicates that Charley is to be persuaded to withdraw his resignation, nicely or otherwise. Now, were you at such a meeting after the other meeting with Stern, Persky, Frank?

THE WITNESS: Not that I recall, sir.

THE COURT: You don't remember that meeting at all?

THE WITNESS: No, sir.

THE COURT: Do you remember any conversations wit any of those people which would give rise in any way to a notation to somebody drawing a conclusion that Mr. Gross was to be persuaded to withdraw his resignation "nicely or otherwise"?

THE WITNESS: Well, the thing that is confusing about these three sentences is that first of all, game plan is a word that is ordinarily in my language. I was also, I was amazed by the lack of questions and opposition. Here the partners were sitting out there and hearing all this. So this sounds to me like some of my words. The nicel or otherwise was never in my mind, and to my feeling and -- Ned Frank was a very good friend of mine during that period of time -- to me it was the kind of thing that Ned would probably have alluded to because Ned was much more vocal and outspoken in these kind of things.

I don't remember this happening with Ned saying it standing next to me or in any kind of meeting of this sort. I don't remember being in any meeting where Persky, Stern, myself, and Ned stood together.

But the thing that does ring home and ring true are those couple of sentences that --

THE COURT: I see.

THE WITNESS: -- thatwould be from my memory.

THE COURT: So you don't have any recollection of anything that you said or was said in your presence by these other gentlemen?

THE WITNESS: No.

THE COURT: Having to do with pressuring Mr. Gross?

THE WITNESS: No.

THE COURT: If he did not willingly agree to withdraw his resignation?

THE WITNESS: No, and to my knowledge there was no meeting every scheduled for the next day and it wasn't until I called I think Gross or Gross' attorney that we had a meeting on September 8th in Golenbock's office.

THE COURT: Go ahead, Mr. Silfen.

Q I think I was asking you about that proposal, Mr. Kayne. First let me ask you whether you prepared the propsal.

A Yes, I did.

Q Did you prepare that proosal in conjunction with others?

A The best I can recall is that I prepared the whol proposal and I may have had somebody look at the language on the second page for me in terms of subordinated debentures or net capita.

Q Would that have been an attorney, that somebody?

A It could have been, yes.

Q Whatdid you do with that proposal?

A Well, I used it as a talking point with several different partners that I went and visited.

Q Could you tell us in as much detail as you can remember what steps you took to try to implement and make alive that proposal?

A Well, through the end of August and the early part of September, I met with a lot of people to try to get them to put in their tax refund or their -- sign back -- put in the money they were in deficit on.

Q Who did you meet with? Let's take it in stages.

A Existing partners.

Q Who were they, if you can recall?

A Andy Newburger, Bob Stern, Harold Richards, and I don't remember which other partners specfically. I think Jim Settel, and I stayed away from a lot of the smaller partners because they won't do it unless the partners that were -- that's what Harold Richards told me. He said "When the other guys put in their money, I will put in my money but I met with existing partners to try to get money into the partnership. Then I met with other partners to try to get them to invest in the partnership.

Q Let's take them, if you can recall.

A I met with Walter Stern of Burnham & Co. who was one of the Stern brothers, Richard, Dick Stern's brother, and he was a senior partner at Burnham. I met with him and asked him "Won't you essentially come to the rescue of your brothers and back a major partner in our firm," besids which he was the head of the research department at Burnham. "Could you come over, would you contemplate coming over and participating in this new partnership as a major partner?"

He had something like three-quarters of a million dollars or some large amount of money that he was -- anyhow it was alluded he had that kind of money; so he took a lot of time, I spent a lot of time talking with him. He came over to the Newburger offices and everything.

Then I met with Al Rosen. Now, Rosen was a -- had his own member firm on the New York Stock Exchange. Rosen cleared through Newburger, Loeb, and he knew Charley Gross quite well, and Jim Settel; and early in the summer or late in the spring they had had talks with him about becoming a part either as an investor or someone in the partnership.

Rosen told me there was no way he would put money in that partnership and get involved in this partnership agreement because he saw it was just straight downhill, and that the partnership agreement which somebody had given him to read, he said, was just terrible for a new investor.

I spent a lot of time with Rosen because he was really a knowledgeable guy in Wall Street. He had his own firm and he was very -- had had all these meetings with Gross and Settel and he was very knowledgeable.

So after spending time with -- and seeing that I was just running up against a wall with the existing partners about getting their money that they owed back in the firm, I was having a difficulty getting people that even knew the firm that had money to put money into the partnership, aside from new people that don't know the brokerage business or anything.

I decided that I was wasting my time trying to get money into the partnership, that I could not get money into the partnership without the help of the Newburgers and the Sterns that had been in New York for 20 or 30 years, and whose names were synonymous with Newburger, Loeb, and these people were not being helpful by not putting their own money in, w-ich they may or may not have had, and/or by not getting other contributors. So with that, and realizing that capital was being withdraw from the firm by notice, by realizing that I couldn't get any money into the new partnership, I conceived of the idea of forming a new corporation and essentially buying the assets of this new corporation, specifically named assets, and with those assets, taking specifically named liabilities, and leaving the partnership to liquidate itself, leaving the partnership its subordinated lender capital, let them deal with their subordinated lenders, leaving them with their limited partners, let themdeal with it.

If there were partners in deficit, let the partners in deficit deal with themselves in the partnership and liquidate themselves.

So what I was proposing was to come in and, with certain pasrtners that were fighting to make this thing go, and were capable guys, guys like Settel, guys like Frank, guys like Sloane, guys like myself, were to come in, and we were going to raise some money for this new corporation, buy specific assets and the adjoining liabilities to those, and let the partnership handle its own problems.

And in this way, the name would go on, the offices wouldn't have to close, hundreds of people wouldn't be thrown out of jobs, and in that proposal I felt that that was a way for the firm to go forward and the partnership to cease to exist.

Q Other than yourself, Mr. Kayne, did anybody else contribute to this concept?

A No, I didn't find any reception for that from anybody.

Q I am talking about I think you misunderstood as to my question -- I in conceiving this proposal did you have joint contributors to the concept?

A At the time I did the proposal, nobody helped me with the concept; I went to other people after I got the piece of paper developed, and at that time various people said that they would be a party to it, in terms of being involved in it, and maybe contributing to the future of this new corporation.

Q Had you had any capital commitments at the time that the plan was conceived?

A No.

Q Did you have any sources in mind for capital contributions other than the partners that you told us about or Mr. Rosen or Mr. Stern of Burnham & Co.?

A Mr.Rosen andMr. Stern were for the partnership, and were going to contribute money into the partnership.

I didn't think of those people as participating necessarily in the new corporation.

Q How about in the new corporation? Did you have any concept or idea as to who would be the capital contributors or shareholders in this new venture if it ever got off the ground?

A I had some ideas and I felt that with some given time that I could probably raise the money.

Q From what sources, if you know?

A Well, I felt that, and my proposal encompasses, raising approximately $750,000 of capital in the new corporation. That would be the new corporation. In addition, raising another $270,000 or a total of almost a million dollars in cash, the $270,000 to be paid to the partnership fo the receipts that I was buying and the corporation then called for giving another $250,000 in subordinated debentures which were bonds.

So I had to raise a million dollars. Now I have raised a million dollars before in other private placements from investors in California that knew me, and had gone along with business judgments that I have had. I had done it before in the building business, and I did it subsequent, thereafter, on a particular private placement venture, in excess of a million dollars. I also met with

Ned Frank's father-in-law, who was a gentleman who was one of the founders, along with -- his father-in-law's name was Arnold Picker, he was a founder of United Artists, along with an attorney in New York by the name of Benjamin Krim. I met with them, particularly Mr. Picker, on the idea of him backing a new corporation. They had come very close, as it turns out, that group of people, to putting money into a major brokerage firm, that one being McDonnell & Co. in the summer of 1969. So they were interested in the brokerage business, and Mr. Picker was certainly interested in his son-in-law.

So with that, with that meeting shortly after this at the end of September and with my feeling of contacts in California, I felt that I could raise a million dollars because I felt the deal I was doing here was very, very good for the people in the new corporation.

THE COURT: Are you going on?

MR. SILFEN: Yes, your Honor, can we take our recess now?

THE COURT: We will take our break.

(Recess.)

MR. MANDEL: If I may take a second, your Honor, I think there is one formality we haven't complied with properly. This morning, you suggested that we mark my diary entry and that other document. We marked it as AAAA but I don't think we got that number on in the court reporter's file.

THE COURT: It was done.

MR. MANDEL: Your Honor, this is just marked for identification.

THE COURT: Yes, I am not giving consideration to know of this matter at all. I only did this because I happened to start this off the record, and went on for some distance off the record, and then Mr. Grutman started to respond off the record, and I just wanted to have a sketchy bit on the record, but as I said yesterday and I say again today, I am not considering this, I am not looking at that exhibit, having nothing to do with it whatsoever. Very good. Go ahead.

BY MR. SILFEN:

Q Mr. Kayne, I think when we recessed you were telling us about your thoughts on capital contribution to the new corporation. You told us about you had previously raised a million dollars on private placement investments of that amount, and now getting back into the events of September of 1970, do you recall a meeting at Golenbock & Barell on September 8th?

A Yes, I do.

Q Tell the Court about that meeting, why it was called, at whose request, who was present, what was said, what was accomplished, if anything?

A I believe I called the meeting. I think I called Gross and asked if we could meet with he and his attorney, and we met in Mr. Golenbock's office.

Since hearing the testimony that's gone on in the last couple of weeks that I have been present at, I believe Mr. Persky was with me. My reason for calling the meeting, the meeting with Mr. Gross and Mr. Golenbock was that I wanted to ask Mr. Gross to withdraw his resignation, and to be of assistance in helping the partnership secure the assignments of the varius partners that were in deficit; and also to ask Mr.Gross to use his, what I thought at the time was significant influence with various partners in withdrawal and limited partners in withdrawal.

Mr. Gross had known the Sterns and the Newburgers for a very long time, and I had essentially only known them for three months or two months or a month and a half, since my coming to New York City. Although I had been a partner I had had very little support to them before that.

So I felt that Mr. Gross, if he would show good faith by withdrawing hios resignation, and use his influence with the Sterns and the other people and Newburger, because those were the two big capital deficits, Andy Newburger and Bob Stern, if he would get those two people and others to assign their tax refunds to the partnership, I felt that we could stem the tide of the capital withdrawals.

I urged him to go along and help me persuade the Sterns and the Newburgers to do this. I urged him to be constructive in this meeting and to help me -- help me in my efforts in this regard.

Q What was Mr. Gross' response?

A Mr. Gross told me that he had given a lot of thought to his resignation, that his resignation was in, his resignation would stand, and that as far as he was concerned, he was out of the partnership, he was out of the affairs of Newburger, Loeb, and that he thought that things would -- that he really didn't care about my request to help -- for his help, and further that he thought he was better off if the partnership had to go into liquidation, he felt that he was better off in liquidation.

Q What was your reaction to Mr. Gross' response, if you can recall?

A I got very angry. Pretty totally frustrated with him, I got very angry and I told him, in no uncertain terms, that I thought he was -- had dealt in bad faith with the partners, he had dealt in bad faith with me, and that I thought that he was a bad person.

Q After this meeting at the Golenbock law firm, could you tell the Court about what steps or what activities you pursued in furtherance of your proposal, if any?

A Well, remember, I had during this period of September a lot of activities to run, and my exclusive time was not spent on just the proposal to try to raise money for the firm. The majority of my time was again spent with personnel. We had this major transfer to W.E. Hutton, about to take place. We had a lot of registered representatives that we had to talk with, and this was an area where I was -- I felt I had strong expertise in knowing what the problems of registered representative was. So I took a lot of my time to travel through the branches and work with the branches and work with the brokers and meet with the managers. I hired a new manager for our downtown office. I hired a new manager fo the 250 Park Avenue office. I had the interviews and all of this.

So I don't sant my answer to seem that I just had exclusive time for just seeking money, which was very important.

It was very important that I kept the activities of the firm running on a day-to-day basis, but with that, I want to say that I continued to meet with partners in deficit, the major partners in deficit.

When I could not communicate directly and seem to make any progress with some of these people who would not ever tell me why they wouldn't assign their deficits, I asked them, did they owe the money, they'd say "Yes, we owe the money." I'd say, "Will you assign the tax refunds?" I never got any answers. I asked to meet with their attorneys.

Q Did you meet with any other attorney other than Golenbock & Barell?

A Yes, I did.

Q Who did you meet with?

A I met with the attorney for the Newburgers, Mr. Max Freund.

Q What was the result of that meeting?

A I asked -- the result was no result. He told me that he felt that he could not advise his clients to assig back their tax refunds because he wasn't sure, in the first place, it was all his client's money, it might be part their wive's money. He couldn't assign back the tax refunds for that reason. He told me that he couldn't -- he couldn't in all good faith at this particular point advise his clients to do what we were asking.

So I said "But your clients, it's their firm, Newburger, it's on the name you know. Are we just going to let the thing go down?"

And he said he had some thoughts about some people, to bring some people in with some money, and I said "Well, good. Go get them, bring them in;" and I never heard from Mr. Freund again.

I also met -- there was one-- I believe I met with Mr. Steefel. It was the only time I ever met Mr. Steefel, and I went to his office, I believe he had given a notice -- I don't remember the exact date, he gave a notice of withdrawal for an estate. I believe he was a trustee for an estate. He had given a notice of withdrawal of their capital. I went to see him and asked him if he could revoke that notice of withdrawal because the firm needed the money.

His point was, and I think he was a trustee, his point that he was a trustee for the estate, now that knew the firm was in trouble, more than ever it was incumbent upon him as his responsibility to leave the notice of withdrawal in.

So I was frustrated at his turn.

We had, in fact, there was another -- Ned Frank had been charged with the power of attorney for a limited partner I believe that lived in Brazil, and I believe we needed some papers signed by him,you know, and he communicated with his client. There were other people that gave notice of withdrawal and they were known by certain partners and I asked those partners to visit with those people and try to get those notices of withdrawal withdrawn. That's what I had hoped to ask Charles Gross to do on the partnership's behalf.

Q Did a time come, Mr. Kayne, when you no longer pursued the idea of changing the structure of the partnership to a corporation?

A , I never wanted to change the structure of the partnership to a corporation. I think that has to be made very clear here because I just wanted to create a new corporation and let the partnership liquidate itself and let the subordinated lenders and the limited partners and general partners handle their own problems and get their own tax refund and own assignments. I never wanted to do -- I wanted to go out, create a new corporation, get new cash capital, no borrowed money, new funds, create a new corporation, get a good deal for the new investors and myself to become one of the operating people.

Q Did a time come when you terminated your activities with respect to the corporation which has just been described in your answer?

A Yes, essentially.

Q When did you stop pursuing that endeavor?

A Well, it was around the first week of October.

Q You told us at a prior answer that during the month of September you were also in touch with the New York Stock Exchange in connection with the clearing agreement. Did a time come when you notified the Stock Exchange that a clearing agreement had in fact been completed?

A Well, the clearing agreement was actually signed on I believe the 25th of August. The Exchange, however, was very anxious that the actual transfer of securities take place. So it took place, I believe, toward the end of September, and that took place over a weekend where the physical securities were transferred from one set of vaults to another, and they all had to be counted and tabulated and it was an enormous job.

And all of the records, the computer record keeping track of all the dividends and everything had to be taken from one set of computers to another.

It was an enormous job and this is where Mr. Risher was so expert and really he just came in and handled the whole thing.

Q Did a time come when Newburger, Loeb advised its customers that the clearing agreement had been completed?

A Yes.

Q Let me show you what I have just marked as an additional Kayne's Exhibit M for identification, and ask you whether or not you are familiar with the letter and the attachment to the letter.

(Additional Kayne Exhibit M was marked for identification.)

A Yes, I am.

Q Let me just show it to Mr. Mandel. Did you prepare the letter and attachment to the letter?

A Yes, I prepared both.

MR. SILFEN: I offer these as additional Defendan Kayne's Exhibit M in evidence.

MR. GRUTMAN: No objection.

THE COURT: Exhibit M is received.

(Defendant Kayne's Exhibit M was received in evidence.)

Q Now, Mr. Kayne, could you tell us the extent of your activities on behalf of the partnership during the month of September, other than what you have already testifi to so far, what you were doing?

A Through September I was still mainly involved with people. I was working with respect to -- there was a tremendous demoralization in the firm through the whole period of August and September. I was trying to cope with that. We had several hundred people working in the firm. I was attempting to attract in some good people to replace some vacancies and to attract in some good people to replace some not so good people.

In particular we hired -- we did not have any office managers in two of our main branches. I hired, I went out and personally put ads in the paper, interviewed, and hired managers of our offices.

Although Ned Frank was an attorney, he had never had any experience in a brokerage firm doing any legal work.

I went out and interviewed around New York , made some inquiri to try to find an attorney; eventually got put onto Mr. Berkowitz and ended up bringing Mr. Berkowitz into the partnership as an attorney.

Q Could you stop there for a minute?

A Yes.

Q Will you tell us about the circumstances under which Mr. Berkowitz became retained by the partnership, to th extent that you were employed by the partnership?

A The best I can recall, I gave him a call in late August and early September and asked him if he would be interested and if he were available in working for Newburger, Loeb in the area of compliance director and in the legal area and that he understood that Newburger, Loeb's main office was in New York City and that he would have to come back to New York City.

He told me that he just wound up, had been essentially thinking about his next job with Kleiner, Bell. He was involved in the closing out of Kleiner, Bell, and he had come from the SEC to Kleiner, Bell.

And I asked him, "Tell me a little bit more about his background," because I did not know him at all professionally. And I asked him for some names and some references, some people he had worked with, with the Exchange, some people he had worked with, with the SEC, and some law firms and people we might know in common.

So that was the telephone conversation, initiated by me to him.

I got his name, I think out of my memory, becaus somebody I knew had worked at Kleiner, Bell and had known him and thought highly of him. He came up in some private placement a year earlier.

I think I went to California once in September or October to see my family, and I think I made an appointment with Mr. Berkowitz and met with him there. I am not sure of that.

I think he came to New York and he was interviewed by Ned Frank and by several of the partners on the executive committee. I am not sure of exactly when he came.

But I personally checked with the New York Stock Exchange, because I had gotten to know them so well by then, that I spoke to a few people there that were working on our account, the Newburger, Loeb account; asked them to check at how the New York Stock Exchange looked at his credibility and his competence in dealing with the Kleiner, Bell matter, whic was particularly gruesome at the time. And they came out and they said that he had done an outstanding job. As far as they were concerned, he would be a good person, you know, for Newburger, Loeb.

I called his immediate superior, whose name I don't recall, at the Securities and Exchange Commission, and he gave me a favorable report.

Based on that, Ned Frank's interview, and a couple of the other people, he was offered a job at Newburger, Loeb.

Q Did you have anything to do with the actual offer, the terms of compensation?

A Yes. I do not recall what they were in terms of dollars or in terms of when he came. He was pretty concerne about his expenses coming to New York, he was concerned about his expenses in living in New York. But he was a New Yorker, he and his wife, and she was an attorney also and, I think, licensed in the New York Bar, and she would have been able to get a job.

So he was looking forward to that sort of thing.

Q At any time during the month of September did yo receive from any of the general partners an assignment of their taxes?

A Not that I recall, unless it was one of the minor partners. I don't recall any partner assigning his tax refun to the firm or paying up his deficit in that crucial period.

Q During this crucial period, that is, during the month of September, did you have dealings and communications with Risher, Muh & Company, Inc.?

A Yes, all the time.

Q Were you involved or did you oversee any of the projects that that company was involved in?

A I felt I was directly responsible for each project they were involved in.

Q You were aware of all of the projects, you heard in this court Mr. Muh's testimony and Mr. Risher's testimony, and does it coincide with your recollection of what occurred at that time?

A Yes. If anything, they were a little modest.

Q What happened next, Mr. Kayne, in terms of your involvement in Newburger, Loeb, the partnership?

A Bob Stern and Andrew Newburger had given me some assurances in the early part of October, in spite of my meeti with Freund, they felt -- and Freund's advice to them to go slow on the tax refunds and assignments -- that they felt, through their long involvement with Newburger, Loeb, that they were going to assign their assignments and then they would --

MR. MANDEL: Excuse me, who was that?

THE WITNESS: Andrew Newburger and Bob Stern.

A -- that they were going to assign their assignments to the firm.

There was an executive committee meeting around the beginning of October -- I don't remember if it was the 5th, 6th or 7th, something like that, I have since seen in the minutes, and there was a difference of agreement well, they just didn't give up -- they just didn't bring in their assignments. And I was totally frustrated and totally upset, and I verbally resigned at that meeting from the partnership and from the firm, based on that.

Q What was the reaction, if you can recall, to your resignation, among those that heard it?

A Well, first of all, they were shocked. People didn't know what to do. And I had not thought it through. The only thing I had done in thinking it through was I believe -- I had not thought it through. The only thing I did was I believe I talked to Chuck Sloane and told him this was a very frustrating period of time. I think he gave me his authorization to resign verbally for him if I resigned.

So I think I had no pre-thought. And I didn't have any answers for him of where to go or what to do. I said, "Well, you guys, I came in here, I can't make any headway, you take it on and go from here."

Q Can you ascribe any reason to them as to why you were resigning?

A Yes. The assignments.

Q The failure to get the assignment of a tax refund?

A Right. I mean, these fellows are sitting right on the executive committee with me, they were major partners of the firm. Stern was a 16 percent partner, I was a 2 percent partner. Andy Newburger was an 8 percent partner. He had been a 16 percent partner the year before. So here is a 16 percent partner and an 8 percent partner not doing anything.

Bob Newburger is a 16 percent partner. "Go out and raise some money, Bob." But nobody sitting in that room was doing anything, except me and a couple of the younger partners there.

So I got frustrated. I resigned.

Q What happened after you tendered your resignation?

A Immediately after?

Q Immediately after.

A I went out and had a drink. But materially, a day later, or that night, I don't recall which, Bob Newburger came right in to me and asked me to please reconsider. He thought I was tired and emotional; that if I would have a night's sleep he would do his best as the patriarch of the firm to go to each of the other people and implore them to sign and to do and to be more helpful. And even though he was not in deficit, he would try to get his brother to make up his deficit.

So the next day I came in, and Bob Newburger came to me and basically I withdrew my verbal resignation.

Q Did you stay on as managing partner?

A I did.

Q What activities, what steps did you take, and what did you do, let's say, after the 8th or 9th of October, that is, after you retracted your resignation?

A All through the month of October I continued to try to tighten up, try to increase the revenues of the firm through visiting Wall STreet brokers. And I had another major responsibility that really was personally horrendous, and that was I had to let 110 people go in the firm. And there were questions of severance. These people, a lot of them, had worked for the firm a long time. So all of my partners on the executive committee, they didn't want to talk to them; they just wanted to avoid it. So I was put in the position of being the, you might call it, the "heavy." I had to lay off 110 people.

Further, it was obvious that they became laid off two months after I became managing partner. So the consternation and the ill will around the firm for me personally was, among the employees, not a lot of fun.

Further, I decided in September and October, and I think it was in October, that the social clubs and the expense accounts and the unearned salaries, salaries that would be paid to guys that were not bringing in any revenues, and these kinds of things, this with a firm hemorrhaging had to cease.

So we cut a lot of salaries. The executive committee might suggest cut a lot of salaries of non-productive people.

At the same time we were hiring people and paying a salary to people, like office managers, Berkowitz, and we were increasing people who were working 60 and 80 hours a week.

Q Were you aware of the financial condition of the partnership at this time, that is, during the month of October, 1970?

A Yes, sir.

Q Do you have an opinion as to what that condition was?

A It was very grim.

Q Do you have any specific details about the status of the partnership at this time?

A You have to be more specific.

Q Numbers; operating expenses.

A I think that the partnership -- we had notices of withdrawal -- well, let me state it:

We had a general partnership capital that looked like it was nonexistent. There was no general partnership capital in my opinion, with the withdrawal notices that were in, with the losses that were incurred, with the -- I mean, the general partners as far as I was concerned were wiped out The limited partners --

The way I penciled it out -- and in this firm you were always dealing with a month ago numbers that were prepared internally and they were not always, you know, absolutely precise, like audited figures are at the end of a year, like with Peat, Marwick.

So the best I could see was that the limited partners were being chewed into in their capital very significantly. And then with the notices of withdrawal of these people, from most all of them, I mean, it was, I guess grim is an understatement.

Q Did you stay with the partnership during the entire month of October?

A Yes, I did.

Q What happened next?

A Well, my wife came to New York on November 1st. We took a -- I had been living in a hotel, the famous Hotel Navarro from August 3rd, in a hotel room, until November 1st, and I made arrangements for a short-term lease, three-month lease, brought my wife and my two children to New York on November 1st.

She went to a specialist here in New York on a problem, and they confirmed what they had found in California, that she was going to need this operation. So that was the first three days in New York for her. And that was right around November 1st or 2nd.

Around November 5th, November 6th, again came up this problem of no progress on the tax assignments, continued withdrawal of capital, no progress on any fronts from the capital standpoint. And I do not remember what the particula thing was at the executive committee meeting or at a meeting the day before, but I know I walked into the executive committee meeting. I think it was some meeting the day before where the partners were sitting around, it wasn't formal, and I walked in and I resigned, and I had it in writing.

And I wanted out. It was the first or second week in November. I don't remember the exact day.

Now, I must say that my state of mind at this time was that I was totally exhausted. I had been in New Yor for three months in a hotel. I was just exhausted.

Q Did you in fact resign --

A Yes.

Q -- from the partnership?

A Yes.

Q Did you retract that resignation; the one on November 5th?

A No, I resigned effective November 30th. The executiva --

Q Did you continue -- I'm sorry?

A No, go ahead.

Q Did you continue to remain in New York for any period of time in November, that is, after the 5th?

A Yes, I had to reverse everything, and I got a break, my payoff on my lease that I had taken, and get my personal plans -- I had finished the -- tests at the hospital were another ten days in New York. I don't remember what hospital it was now. I had to go through that.

So when we got done with that, I finished up my personal business in New York; and from about the 15th of November on, I don't think I had any partnership business that I did, other than being available to answer questions or talk to some of the people that I had hired into the firm;

like the two office managers, I had hired them in, and now I was leaving, and I had to sort of explain why that happened. And Berkowitz came and I went. And I had to explain that to them.

MR. SILFEN: Perhaps if I lead a little, your Honor, I can get through a lot of this next part.

Q Is it a fair statement to say that you left New York on or about the first of December?

A Yes.

Q Went on a vacation with your wife for approximately two weeks?

A Yes.

Q And came back to California on or about the 14th or 15th of December?

A Yes, correct.

Q Is it a fair statement to say that during that time, that is, December 1st to the 15th, you had no contact with anybody at Newburger, Loeb, whether it was in California or in New York?

A That's correct.

Q You returned to California on or about the 15th of December?

A Yes.

Q Did you stay on as a registered representative of Newburger, Loeb?

A Yes .

Q Beyond the period of your resignation as a partn

A Yes.

Q Now, if we begin to concentrate on the period from December 15, 1970, prospectively. Can you tell us when for the first time, after you returned from this vacation, did you communicate or receive any communication from anybody at Newburger, Loeb, the partnership?

A Well, I talked to Sloane when I got back to California, and I believe he told me Muh wanted me to call him.

Q Did you speak to Mr. Muh?

A I did, yes.

Q Can you fix a date that you can recall now when for the first time did you speak to Mr. Muh?

A I think it was right the day after I returned. And you say the 15th. It might have been the 13th or the 14th . I have no -- I have since tried to find my travel vouchers or something. I have no idea. It was right in tha period.

Q What was the substance of that conversation, setting aside the social amenities?

A The best I can recall, before I had left New Yor at the end of November I know that Muh and Risher had been asked by the partnership to go forward, would they stay and would they operate the business on behalf of the partnership.

And I think they had accepted. When I came back, Muh told me that they had been hired and they had been fired, and then they had been rehired again. And he told me essentially that they were asked by the limited partners who felt that they had the most to lose, because the general partners had lost all their money, the subordinated lenders, you know, were after the limited partners -- they had been asked by the limited partners to put together a plan to go forward and try to save this partnership, try to save the limited partners' money and the Newburger, Loeb partnership.

The best I can also recall is that it was at that conversation that he told me that the essence of their plan had to be to deal with every party; that they had to make a position for the subordinated lenders and the limited partners and also for anybody that had good capital in the firm.

Q That is the essence of the first conversation with Mr. Muh?

A Right.

Q Did you have any subsequent conversations with Mr. Muh shortly after that first conversation?

A Yes. And I don't -- it was in that period of the 13th to the 17th, I don't recall, but that was a conversation where I think in that first conversation I said "Just do your best. Anything you can do to keep this partnership alive would be terrific as far as I am concerned, as far as partnership liability."

And I think it was that conversation or the next conversation when he told me that in the original plan that he and Risher had submitted to the Exchange that I was not included; however, at the request of the Exchange they insisted that I be included, and would I -- and he had taken the liberty, without talking to me, to say that I would go along, owing that when he got to talk to me I had the righ to withdraw my name.

And he also told me that he had argued on my behalf that I be in an equal position with Paul -- Bob Muh, Paul Risher and myself, would be in an equal position in the new corporation. And I remember thinking that was very nice of them, and I told him that that wasn't necessary, because, you know, I really didn't care. All I wanted was for the partnership to survive.

Now, I do not know, really, if that happened in the first conversation with him or the second conversation, or whether it was the 13th or the 17th. And I have heard these dates in this courtroom for the last three weeks, and I cannot fix it any better than that.

Q Were there any other conversations with Mr. Muh during the same period of time that you can recall?

A No.

Q During either of the two conversations that you told us about, were there any discussions with Mr. Muh regarding the extent of your capital contribution to this new venture?

A I don't think so.

Q Did a time come when Mr. Muh reported to you or that you inquired of him as to whether or not it was finally determined between Mr. Muh and Mr. Risher and the Stock Exchange that you were to become part of the new organizatio

A Yes.

Q When did that come and how did you find out, an if you can recall, the substance of what was said?

A I think the first time I heard about it was when they said they -- when Muh said they were going to make the proposal to the Exchange and that I had to be one of the key guys so that the Exchange would have an operating key guy that had prior brokerage experience. And I do not remember ever hearing different from Muh one way or another after that. It just sort of went on.

Q Mr. Mandel is inquiring as to whether you can fix a date as to when this last remark or this last conversation may have taken place.

A I don't think I testified to any last conversation. I think that what I am talking about is that in that conversation where Muh said the Exchange has asked you to be in, Muh said, "You are in, and I want you in equal to Risher and I."

And I said, "That's very nice of you, but very unnecessary."

And he said -- and from that point on, whatever they did, you know, in negotiating, I never heard anything different that I was in or I was in as -- I never even knew what my title was until much later.

Q Did you participate in any of these negotiations that were going on in New York?

MR. MANDEL: Was this between the 13th and the 17th?

A From when I got back until when I talked to him?

Q Did you participate in any of those negotiations that were going on in New York?

A No.

Q Did you go to New York at any time during the month of December?

A No.

Q Did you discuss the extent of the negotiations with anybody other than Mr. Muh?

A I don't think so, other than I think I talked to Persky, either once or twice during the month of December.

Q Can you fix a time for these conversations with Mr. Persky, and if you can recall, the sum and substance of them?

A I think the substance -- the dates I have no ide I cannot fix, I cannot recall any dates during the month, th end of December, and that was also kind of foggy because as said, my wife went into the hospital at that particular time for a heart operation. So I didn't really care, okay, about the dates.

Now, the substance of them was, was the first time I remember Persky calling me, I believe he called me, to the best of my recollection, to substantiate what Muh had told him, that I was in fact willing to go along and have my name used, and have my name used in this new corporation by the -- as requested by the New York Stock Exchange.

Q Is that the substance of both conversations?

A Yes. And I do not know of the second conversation, if I talked to him a second time, was -- it just seems

I would have talked to him once or twice.

Q Did Mr. Muh give you any information when he spoke to you in December after the 13th about what was going on in these negotiations in New York in terms of sides or positions?

A No, the basic thing that he told me was that they were under pressure of termination of business from the New York Stock Exchange and that what he and Paul were doing was meeting with and getting extensions of capital, at the same time trying to forge together a deal that would please all the parties.

And I said "Godspeed," you know.

Q I showed you before the recess the second page of Defendant's XXX in evidence. And now I would like to show you a letter which is dated December 30, 1970, addressed to Paul Risher, and ask you whether you are familiar with the content of that letter.

A Yes, I am.

Q Could you tell the Court, as best you can recall, the circumstances under which that letter was written, and I would just like to show it to Judge Owen for a moment so that he will be able to follow this along.

A As best I can recall, when I left New York on December 1st, I did not go straight home, I went to the

Caribbean. So I took all of my stuff from New York, files and papers, and I threw them in cartons and had them sent out to my office in California. When I got back around the 14th or 15th of December, I spent the first three or four days, or the week, in California before my wife went into the hospital, essentially catching up on California business

From the time between Christmas and New Year's I think I went through my files that came from New York. And I think in my files I came across this letter, dated August 24, which lists these warrants. I think as a matter of curiosity, as best I can recall, I took that and checked the prices on some of these things and saw that Geon had -- the common stock traded on the Exchange had appreciated in value from its $10 price in August to the $15 price or $16 price around that time, the end of December.

So I saw here a letter, I recalled the conversation that we had from Ned Frank, that these things were not going to be distributed and that they were sitting here, and I knew that Hall, Risher, rather than Bob, Hall is more involved with the financials of the firm at that time, pulling together the financials and tabulating them and keeping track of them for the partnership. So I wrote Paul a letter, and my major point in the letter was the first paragraph of this letter, which says:

"Here is this thing I found in the file. There is a value to these Geon warrants, I think. And that the position that even though I voted on this thing at that time. I feel that it was wrong at that time."

Now, further in the letter I stated here:

"I would suggest that" -- my famous quote -- "I would suggest that you get your hands on these warrants and have them held in the vault at one of our banks."

I would like to take a moment on that.

Newburger, Loeb, on the eighth floor of 5 Hanover Square, had their executive offices. On the ninth floor they had a big vault, where the clearing operation was. This vault was a big walk-in vault. This is where they held their $100,000,000 worth of securities for customers' accounts.

During the end of September, when this was transferred over there, there was a lot of odds and ends left around in that vault. The odds and ends were securities in defunct corporations, and various other worthless securities.

During the month of October and November, I remember distinctly Bob Muh coming down to my desk and dropping a big box on my desk being full of Russian Czarist bonds from 1933 or 1920 or something or other.

He dropped them on my desk and he says, "Look at what I found in the vault upstairs." And I says, "What are you talking about?" And I went up with him and I walked through this vault, and there was all kinds of things in there.

I immediately put a little task force on to see if these Russian Czarist bonds had any value, because they turn them in to old governments, you know, and you get back valuations of these things. And so it turned out that the Russian government isn't honoring those.

But in my mind I remembered that vault up there and I remembered access. But prior to that, Newburger, Loeb had always had security up there when we were in the business. They had armed -- not armed, but guards there at the door and you couldn't just walk in and out. And I had a distinct recollection of those bonds being dropped on my desk and also -- and I didn't hear, you know -- as I recall later on, when we took over the operation of the corporation, Mr. Muh found at various times other certificates showing up in filing cabinets that did have value. And they were stuck around the firm, and the firm had been in business for fifty years, and there were a lot of pieces of paper, some of them that it was really surprising, some of the things that turned up.

But when I wrote this last sentence, I wrote it, as best as I can recall, with that in mind:

That "Paul, get your hands on these warrants and put them in one of the vaults at one of our banks." And by "our banks," I was a Newburger, Loeb man, and I was working there, and I said, "our banks."

Now, when this letter was introduced, I did not take a very good look at it and I did not look at it at all, and somebody stated out loud here that the "our banks" is underlined, "our" is underlined. That is my signature, that is the way I make my signature, and I would like to point out to the Judge --

MR. BIEHL: Don't do it on an exhibit.

THE WITNESS: Oh, not on an exhibit. Do you have a piece of paper?

Q I think what you are trying to tell the Judge is that the line on the arrow is the top of the "F" of Fred.

THE COURT: Perhaps we can have a specimen.

How about your driver's license?

THE WITNESS: Yes, that's a great idea.

(Handed to the Court.)

THE COURT: I see. Okay.

A Now, the only other thing that --

MR. MANDEL: Excuse me, your Honor. I don't want to be misunderstood. Mr. Silfen said something to me quietly, and that is what I was laughing at. It was not because of anything that Mr. Kayne said.

A I was sitting in the court when Mr. Risher testified that he read the letter, and he ignored it. And other than having some personal pique at the fact that he would ignore one of my letters, I thought as to why he might ignore it. And I explained to my counsel after that -- .

Q No, I don't think you need that.

A No, I think this is important, no, I think this is important.

I explained to my counsel that there is no one, it didn't matter that these warrants were stolen out of the vault, there is no one that could have cashed them but Newburger, Loeb. They were unregistered warrants in one piece of paper. They were held in the name of Newburger, Loeb. The only people in the corporation -- only the corporation could cash them on the books of Geon or anybody else.

THE COURT: You mean the partnership?

THE WITNESS: Yes, only the partnership could hav cashed them or the holder of that warrant, whoever his name was on it could have cashed it. They were not negotiable.

So I hope that was the reason that Paul Risher ignored my letter.

Q Copy of that letter was sent to Mr. Persky, was it not, Mr. Kayne?

A Yes.

Q Will you explain to the Court as best you can recall why you sent a copy of that letter to Mr. Persky?

A I had worked with Mr. Persky very closely through the whole period that I was in New York, that after I retained Mr. Persky. And to my feeling, he worked diligentl and hard on behalf of the partnership. And when I wrote thi letter, I did not have any idea that Mr. Persky, as I have heard testified here, was a partner -- was an attorney for this entity or an attorney for that entity. As far as I was concerned, Mr. Persky was the attorney for Newburger, Loeb & Company, and I was sending him something that I thou was a notice of a significant thing that I had found.

Q Did you become aware, Mr. Kayne, in December that there was a rather long meeting that took place at the offices of Finley, Kumble?

A Yes -- no, I became aware in January.

Q Did Mr. Muh or Mr. Persky advise you that there was a closing or a model closing or a tentative closing scheduled for December 30th?

A I don't recall if they advised me that there was one to be scheduled. No, I don't recall that.

Q What is your best recollection as to when you found out about that closing?

A After it took place.

Q Now, Mr. Kayne, you have been in this courtroom or you have heard various people testify about their awareness of a lawsuit you and Mr. Sloane brought in the federal court or the state courts of California, is that correct?

A Correct.

Q Now, I would like you to tell this Court, slowly, as best you can recall, the events that led up to the lawsuit and what steps you took, if any, beginning in January of 1971, in the furtherance and pursuit of that lawsuit.

A After the first of the year, Chuck Sloane and I basically sat down for the first time and discussed the events that led up to our joining the partnership of Newburger, Loeb & Company in the previous year, to trace the events from the first meeting until we became partners on February 28th.

We decided, after discussing among ourselves, that we had significant grievances against him, and maybe against some other partners. So we decided to seek some leg advice on that matter.

Q When for the first time if you can recall did you seek any legal advice in connection with this lawsuit; that is, the lawsuit in California?

A As I recall, it was early in January, 1971, Sloan and I went to the firm of Ervin, Cohen & Jessup, which is a well-known law firm in Beverly Hills, California.

We met with a partner by the name of Bert Massing, who is one of the four senior partners of the firm. Erwin, Cohen & Jessup firm has around twenty-five attorneys, and I heard nothing but good things about them.

And Mr. Sloane knew Bert Massing, had previously had some work done.

Q Did you have any knowledge at that time as to whether that law firm had any areas of expertise, that is, did they specialize in anything, if you knew?

A I knew, up to then, until I got there, I knew that they were very strong in the tax and the corporate area. And our initial meeting was with Bert Massing only, at which he listened to it, made some notes, took a copy of our partnership agreement, and told us of the additional areas that his firm was capable of handling.

I asked him, Was this a matter that they could prosecute for us that was in their area of expertise?

He pointed out they had a strong litigation department and that they had several partners in it and several associates, and that he felt that this was a matter and he made an appointment for us to come back within a relatively short period of time.

Q Did Mr. Massing express an opinion to you at the time of your first meeting as to whether or not, in his firm's opinion, there was any merit to your claims and grievances against Mr. Gross?

MR. MANDEL: Your Honor --

THE COURT: Sustained at this point.

MR. SHAW: Doesn't that relate to his good faith, your Honor?

THE COURT: No, there has been nothing submitted as to what he told his lawyer, as to what the facts are. We have absolutely nothing here on which the lawyer's opinion can be admissible, assuming it is relevant in this.

Q Would you then tell the Judge, if you would, what it is that you told Mr. Massing at this first meeting?

MR. MANDEL: Your Honor, I believe that is objectionable too.

THE COURT: We are getting off into a lot of byways.

Mr. Silfen, it would seem to me to be more relevant rather than what he and his lawyer talked about, as to what this gentleman was thinking and the reasons for the assertion of this in January or February rather than the conversation with the lawyer.

MR. SILFEN: I think, your Honor, one of the problems is this:

One of the problems that you have intimated is whether or not the bringing of the lawsuit in a California court, for reasons described in that federal complaint, could be categorized as malicious or brought in good faith.

THE COURT: Yes, that is fair enough. I agree with you on that. That is fair enough. Obviously the lawyer cannot say what his advice was unless you give the state of facts that he had presented to him on which he is making the statement.

But even earlier than that, it seems to me that there ought to be something here so that we have some idea -- I do as the trier -- as to what was motivating Mr. Kayne and presumably Mr. Sloane to the extent he competently brings him along with him in the testimony. Why not January, why not June, why not October?

Q What was on your mind, Mr. Kayne, referring to the Judge's inquiries?

A Okay.

I first met Charles Gross, with regard to

Newburger, Loeb, in late August or early September of 1969. Sloane had met him I think a week or two previous in New York City.

Gross came out to California to talk with Sloane and the people in the McDonald office about opening a branch in California and in the Century City area. He came out with two other partners, Settel and Bob Newburger.

We met, there was a presentation by Mr. Gross with Mr. Newburger and Mr. Settel present to all the brokers in the McDonald office in which they outlined their desire to open an office in California. They outlined their strong financial strength, their strong profitability, and gave a generally favorable, bullish picture of their firm. This was in September of 1969.

It was at this meeting many questions were asked by brokers, because these brokers were being asked to cast their lot with Newburger, Loeb and to join Newburger, Loeb as brokers.

The questions were very hot and heavy with regard to capital stability, earnings, net worth, and things in this area. Because all these brokers were currently employed at McDonald & Company, and McDonald's publicity had been strong in the newspaper in the summer of '69, with a major article in the Wall Street Journal.

THE COURT: When was this? In '69?

THE WITNESS: This was September of 1969.

Now, Mr. Gross carried this meeting, which was about an hour and a half meeting, in front of all the brokers. It was also stated by Mr. Gross at this meeting that Newburger, Loeb, if any of the brokers joined Newburger Loeb, that Newburger, Loeb would guarantee each broker that joined them an income for the next six months based on their previous six months' income -- some formula like that.

So there was a significant guarantee attached to the joining of each broker, which continued to imply that Newburger, Loeb was in very strong condition.

Subsequent to that, Mr. Sloane left the employ of McDonald & Company and joined Newburger, Loeb on October 1, 1970, and --

Q '69.

A 1969, excuse me.

In 1969 I had two or three meetings with Gross, in California, and then one in New York in December, in which I met with Gross only as a representative of Newburger, Loeb.

In my December meeting in New York I met with several -- I met several other of the partners in New York. I met Ned Frank for the first time and met several other people. But all the representations with regard to balance sheets, with regard to earnings, with regard to capital, with regard to where the firm is going, all of the representations were made to me personally by Mr. Gross.

Mr. Sloane can testify to what representations were made to him.

In January of 1970 I came to New York and again visited Newburger, Loeb and again met with Mr. Gross; and again all the representations were made by him to me on financial matters.

I was perhaps young and naive, in that I did not speak to the other eighteen partners of the firm, but I was meeting as a, I guess, 31 or 32 year old fellow who was joining a partnership for the first time. I was dealing one on one with the managing partner of an old line brokerage firm in New York City. And I took his representations as he gave them to me.

The reason I had to go borrow money, my $25,000 for my first investment in my Newburger partnership, is, that when I told Gross that I did not have the money to invest in the firm, he said he would arrange the loans for me through First National City Bank in New York. He subsequentl failed to do this, called me up and said, "Could you get the money?"

I arranged and got the money and invested in the partnership.

When I bought in the partnership, I bought in 2 percent, not of the assets -- it is 2 percent of the profit or the losses. And I never would have bought into a firm, bought 2 percent of the losses, if I had known that the previous year in 1969 the firm had lost $1,000,000, which Gross had told me it was profitable, and if in --

THE COURT: Mr. Kayne, I don't want to get too deeply into this, because this aspect was litigated.

MR. SILFEN: That is what I tried to avoid, your Honor.

THE COURT: I know, but what I was hoping to get to was having some idea of the picture of what the claim was; when did he think about asserting it and under what circumstances did he think about asserting it. Obviously I am not going to re-litigate that.

MR. SILFEN: That is what I tried to avoid, your Honor.

THE COURT: How about an assertion of this claim? What were your thoughts about asserting it and when did you have them and what did you do about them?

THE WITNESS: Right.

When I became a partner in February -- as I stated, it was in the May area -- or the April area when I first found out there were losses. It was in the May to Jun area I found out that the losses were increasing, and it was in July when I decided to resign, and then stayed on as managing partner.

I felt from the period of August on that I was managing partner, that I didn't want to create dissension -- and I did not have the time to go sit down with an attorney. I did not have any attorney in New York who is my personal attorney. In fact, I didn't have an attorney in California who was my -- I never had an attorney -- no, that's not true I had an attorney on another matter. But I never had an attorney in New York City.

I did not think to sit down and start litigating in the Newburger, Loeb problem at that time.

When I went back to California on December 1st -- I didn't go, I went to the Caribbean, my wife went to the hospital. And to me, in looking back in retrospect, the Jan period of time was as early and as prudent a time as I could sit down, when the smoke had cleared on my responsibilities, and I was sitting down and saying, "Okay, let's collect your thoughts, let me compare notes with Chuck and see if Chuck Sloane has the same view of the world that I do, and let's see if -- then let's visit an attorney who is impartial, has no exposure to the case, and get him to give us an analysis."

THE COURT: When did you go to an attorney?

THE WITNESS: Went to an attorney in the first week of January, 1971.

Q Did you substantially tell the attorney the same type of information that you just told Judge Owen?

A Yes. Except that first meeting was with Massing alone. The second meeting was with two of his litigators and Massing.

Q How long after the first meeting did the second meeting take place?

A A matter of days.

Q What transpired at the second meeting in terms of-- did you give them additional information that you had not given Mr. Massing at the first meeting?

A Well, they basically had a chance to read it, the partnership agreement, and then we went through and Sloane and I gave our versions and who we had met with and what-have-you.

Q What happened at the second meeting when the litigators came in?

A They said that they --

MR. MANDEL: I object to that, "they said."

Hearsay, your Honor.

THE COURT: Well, this has to do on the issue of damages for bringing an arbitrable matter in state court and causing you the expense of removing it to arbitration -- bringing the matter in federal court, rather than arbitratin it and causing you the damages, to wit, the expense of removal.

MR. SILFEN: Your Honor, I think this is relevant on that issue and on another issue also.

THE COURT: I will overrule the objection on that issue. Go ahead.

THE WITNESS: Well, we described what we had don They said that in their opinion we had bought a partnership interest across state lines, and that was similar to a security; and that we should file, and we bought that securit on the basis of misrepresentations, fraudulent inducement, and some other words which I don't recall; and that we shoul file an action in the federal court in California 10b-5 frau is that the term? For a 10b-5 and fraud and for buying a security; that is essentially it.

THE COURT: When you get to a point where you want to stop, let me know.

MR. SILFEN: I was just going to ask a few more questions about the preliminaries.

Q Was there any discussion at either the first meeting or the second meeting as to whether or not the claim or claims should be brought before the New York Stock Exchange or in a federal court in California?

A Excuse me, will you repeat that?

Q Were there any discussions at either the first or second meetings as to whether or not any of the claim or claims should be brought before the New York Stock Exchange or the federal courts in California?

A As I recall from reading the document, they said that there was an arbitration provision in there, but in their judgment it should be brought in California because of this security -- because of things I said earlier.

MR. SILFEN: I could recess now, your Honor.

THE COURT: Very good. 1:30 tomorrow.

(Adjourned to July 24, 1975.)

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NEWBURGER, LOEB & COMPANY, INC. et al.

vs. 71 Civ. 685

CHARLES GROSS, et al

July 24, 1975
1:30 p.m.

- - -

(Trial resumed.)

FRED KAYNE, resumed.

DIRECT EXAMINATION CONTINUED

BY MR. SILFEN:

Q Mr. Kayne, to bridge the gap between the close of yesterday's session and this afternoon, I think when we left off yesterday you were testifying as to the events that took place at your California lawyer's office, at the second time that you had met with them in California some time in January, and I think the last question posed to you had something to do with a discussion as to where the proposed claim or claims should be brought, and I believe your last answer had something to do with an examination of the partnership agreement and the rendering of an opinion by the California counsel that notwithstanding an arbitration clause, they felt that the litigation could be brought in the federal courts of California.

A Yes, I believe that is what I said yesterday.

I think I was mistaken in that the partnership agreement there was not an arbitration clause, but they were apparently aware at that meeting, it came out, that there was an arbitration procedure that was available and notwithstanding that arbitration procedure, they felt for the reasons I testified yesterday, that this matter should be and was properly in their opinion, should be tried in federal court.

Q What else transpired at that meeting, if anything

A Well, at the second meeting they had the litigation partners, the two litigation partners had reviewed the documents, partnership agreement, and reviewed my conversations with Sloane and I with Mr. Massing, and had gone into some study of the situation, and they asked me som questions with regard to the specifics, and spent some time on that. And then they discussed the aspects of going forward, most particularly, wanted me to be aware of the costs and of the fees, and I asked them if they -- what the fee procedure was, and they told me it would be a straight hourly fee procedure and they would bill me as the hours -- bill us as the hours were done, and I think I inquired about a contingency arrangement with them, and they declined any contingency arrangement.

The next thing that they asked me and we discussed was whether or not we had sat down with Mr. Gross or talked with him with regard to trying to settle our differenc amicably.

I pointed out that no, we had not, the last time I had seen Mr. Gross was some time in October, as best I could recall, October or November of the previous year, and that I had not talked in any case about it; my personal grievances, or had any contact with him since.

They pointed out that the cost of a lawsuit, the expenses involved and the trouble involved and the time involved on a personal basis -- and they pointed out that even when you got to the end of the path, you could just as you could lose as well as win, and so they suggested very clearly that Sloane and I seek a meeting with Gross and talk with him and try to settle any differences amicably.

Q At this meeting, after you had explained the facts to Mr. Massing and there had been a colloquy with the litigation counsel and after you had provided Mr. Massing at the first meeting with a copy of the partnership agreement, did you ask either Mr. Massing or any other lawyer of that law firm as to whether or not they would be in a position to render an opinion as to whether or not in their opinion you had a good claim?

A I don't recall specifically asking them if I had a good claim. I recall their saying that, "It looks like you have a good claim, but we would suggest you try to work it out peaceably rather than go through a court procedure."

Q After the second meeting, Mr. Kayne, did you have any other meetings with your California counsel in or about the first couple of weeks of January?

A Not that I recall.

Q What happened next , Mr. Kayne?

A With regard to this lawsuit?

Q With regard to the California lawsuit and any advice or information or anything that transpired as a result of that second meeting with the lawyers.

A Some time thereafter, and I have had difficulty placing the exact date of my arbitration testimony when I wen back and reviewed that, but it was towards the end of January, and I heard Mr. Gross testify January 23rd, and I have no reason to dispute that date, so around that time I went to New York on business.

I had several large clients in New York that I visited, and while in New York I called Mr. Gross and made an appointment with Mr. Gross to have a meeting with him.

Q Had you notified anybody at either Newburger, Loeb that you intended to meet with Mr. Gross prior to the time that you telephoned Mr. Gross upon your arrival in New York?

A Only Mr. Sloane.

Q Just backtracking one minute, if I may, at that second meeting with the attorneys, had you and Mr. Sloane entered into an agreement with them whereby the firm would render services for you on an hourly basis?

A No.

Q Did you in fact call Mr. Gross upon your arrival in New York?

A I don't know if it was upon my arrival. I called him, I don't know how long I was in New York. I think it was two days and I called him shortly after, during that period of time.

Q Could you tell us in capsule form the sum and substance of that telephone conversation?

A Yes.

I called him up, I believe it was in the morning, and I asked to meet with him. He asked me what I wanted to meet about, I told him it was a personal matter, and we made an appointment to meet in a local restaurant.

Q Is there a reason, Mr. Kayne, that you did not tell anybody in advance that you intended to meet with Charles Gross in New York?

A Yes. I felt that I didn't want to tell anybody because I felt that somebody might dissuade me from meeting with Mr. Gross.

My matters that I wanted to discuss with him were essentially between Sloane and myself and Gross, and I did not want to -- I did not want to be dissuaded from meeting with him.

MR. SHAW: I am going to object and move to strike that out, your Honor, as an operation of his mind and not being binding upon any of the other parties in this case.

It seems to me that if he would have told us we would have said "don't meet," and I don't think that is proper proof.

MR. SILFEN: I think he can testify as to what was on his mind and motivation, your Honor, since motivation is a big part of this case.

MR. SHAW: That might be binding on him, your Honor, and I have no objection to testimony insofar as it relates to Mr. Kayne, but I do not want it to relate to us.

MR. MANDEL: Your Honor, I believe Mr. Kayne's opinion and understanding, insofar as it is relevant, is admissible against co-conspirators.

MR. SHAW: If Mr. Kayne testifies with respect to some statements or acts upon other person's part which led to this opinion on his part, then I have no objection.

If it is just the mere operation of his mind, I think it is not binding.

MR. SILFEN: Your Honor, I think the testimony is clear that there were no acts, he was not acting on anybody's advice. In fact, it was quite to the contrary.

MR. SHAW: I also do not believe it is a matter of conspiracy law that the state of mind of one co-conspirator is attributable to another co-conspirator.

The acts and admissions are --

THE COURT: I don't know that that is as to eithe so I am not considering the evidence in that light. I think for the moment, given the contention that this lawsuit was motivated to coerce Mr. Gross, which is what this testimony is directed to, I will permit this to stand for that -- going to that rubric.

MR. SILFEN: That is all it is being offered for, your Honor, on that issue.

THE COURT: All right.

Q Jumping ahead, Mr. Kayne, did you meet Mr. Gross; did you not?

A Yes, I did.

Q Would you tell Judge Owen and the people assembled what transpired at that meeting?

A Well, it was a relatively short meeting. We were in a restaurant, busy restaurant, about twenty or thirty minutes; and the meeting essentially had two parts:

The first part was that the area of talking with Mr. Gross and telling him that Mr. Sloane and myself --

MR. SHAW: Can we have the place of the meeting, your Honor? It will help fix it in our mind.

THE WITNESS: I don't know what restaurant it was in. It was in the Wall Street area. It was in a --

A I met with Mr. Gross and told him that the -- tha I wanted to talk with him on behalf of myself and Sloane with regard to grievances that Chuck Sloane and I had against Mr. Gross for dating back to prior to our becoming partners in Newburger, Loeb.

I told him essentially that both of us had lost $50,000, we felt it was directly involved with his inducement into the partnership, and told him we had visited with attorneys in California, personal attorneys. They advised us that we had a case against Mr. Gross, after we had given them the facts, and that they had also advised us that we should meet with Mr. Gross, one of us should meet with Mr. Gross, and try to settle our differences amicably.

I told him that I felt that it was due to him and his representations that we lost the -- each lost $50,000, and I would like to come to some understanding on how to get my money back.

He rejected my contention, our contention, and told me that he had lost a lot of money in the deal and that he did not feel that there was any grounds for our contention or our lawsuit.

I told him at that meeting what I felt was the gravity of the suit and talked about it -- told him some of the things that our attorney had told us that I testified to yesterday. That was the relatively quick and short part of that meeting because he just rejected it and told me that there was nothing further to talk about on that.

The second part of the meeting was my inquiry of him as to his thinking with regard to not going along with the reorganization program. I told him that I had -- was also a withdrawn general partner, and I had understood that he felt the partnership was better off in liquidation and that he in the partnership was better off in liquidation than in going along with the reorganization agreement.

And I asked him if he would take some time and explain that to me, and how he figured that out because I thought I was in a similar position as he was.

He pointed out to me that it was his view that he had resigned early in the game, and that his capital was in a better position than the limited partners', and he was considered to be a form of a creditor of the firm, and he went into a rather brief explanation of this.

I told him I could not understand what he was talking about, that my reading of the partnership agreement was that this just was not so and I didn't understand how a general partner could leapfrog ahead of the limited partners.

He told -- I told him that I thought he should recheck his position, he said he had spoken with his counsel and that was his interpretation, and that was about it. It was a pretty amicable meeting.

It was a -- we just finished our coffee and left.

I think the only other thing there was when we first met he was very pleasant and inquired as to my wife and her illness and it was a very pleasant meeting all the way through.

Q Were there any unpleasantries exchanged between Mr. Gross and yourself at that meeting?

A No; not that I can recall.

Q What next did you do, Mr. Kayne, after that meeting, in terms of communicating, if at all? What transpired at that meeting with Mr. Gross?

A I think a little later on in the day I called Mr. Sloane and told him of essentially the contents of the meeting as I recited them here, and I believe I told Mr. Muh that I had met with Mr. Gross.

Q Did you tell anybody else in New York, if you can recall, other than Mr. Muh, the results of that meeting with Mr. Gross?

A Not that I can recall. I may have.

Q Did you thereafter communicate with your attorney in California at any time regarding the meeting with Mr. Gross?

A I think that although I did not call him from New York, I think Mr. Sloane and I agreed that he would call and ask them to begin work on the lawsuit.

THE COURT: Mr. Kayne, in your meeting with Mr. Gross in New York, did you say anything to him to the effect that if he consented to go along with the reorganization, you would not file your lawsuit?

THE WITNESS: No, sir.

Q Did you return to California?

A Yes. I think I was only in New York one or two days.

Q Did a time come, Mr. Kayne, when you were advised that your attorneys had prepared a complaint for service against Mr. Gross on your behalf and on behalf of Mr. Sloane?

A Yes.

Q Can you give us a frame, time reference, as to when you were so advised about the preparation of either the draft or the final form of that complaint?

A It was in a relatively few days after I returned from New York.

Q When you returned to California, do you recall whether you had any telephonic communications about that meeting with Mr. Gross other than the face-to-face meeting with Mr. Muh in New York?

A Excuse me? About Mr. Gross with -- could you repeat the question?

Q With anybody else.

In other words, while you were in New York, I think you said you may have spoken to Mr. Muh about the meeting.

I am saying, when you got back to California, did you report to anybody in New York about the results of that meeting?

A Not that I recall, no.

Q Did you see a copy of the proposed complaint prepared by your California attorneys?

A Yes.

Q Did you see the final draft of that complaint?

A I don't recall if I -- I think I saw it after it was filed, but I don't recall if I saw it before it was filed.

Q At any meeting or conversation that you may have had with your California attorneys upon your return to California, did you at any time instruct them that the complaint had to be filed before that certain fixed date?

A No.

Q Did you in any conversation or meeting with your California attorneys advise them that the service of the summons and complaint had to be effected before any fixed date?

MR. MANDEL: Your Honor, at this point I am going to object to leading questions.

THE COURT: Yes, sustained.

Did you say anything to them about when you wanted it filed?

THE WITNESS: No, sir.

THE COURT: All right.

Q Did you say anything to them about when you wanted it served?

A No, sir.

Q Did you continue to be employed by Newburger, Loeb as a registered representative during January of 1971?

A Yes.

Q And now I think we have fixed that time late in January after the meeting with Mr. Gross and we have got you back in California.

Could you tell us as best you can recall what next transpired involving you?

A With regard to what?

Q With regard to the issues involved in this lawsuit.

Let me ask you this, Mr. Kayne:

Did a time come when you were made aware that you were required to return to New York?

A Yes. I think I was asked to come to New York the day before the closing, the night previous to the closing, and I think that was the day of the tenth, which is when I came to New York.

Q Do you recall when you were informed for the first time that the closing was to take place on February the 11th?

A No.

In fact, that is a very hazy period because I thought, originally thought there was supposed to be a closing on January 25th, and then there was supposed to be a closing on February 1st, and these things were constantly being pushed back by the New York Stock Exchange

And I wasn't -- I was never really sure, except for a day to day -- when the day was or when I was going to be needed for any signatures. It was never really clear whether I was needed for any signatures because to December 31st closing I didn't sign any papers.

Q Did you come to New York on February 10th?

A I believe it was February 10th, yes.

Q You sat in this courtroom now for over three weeks, Mr. Kayne, you have heard testimony about the events of February 11th. Can you tell us as best you can recall, your knowledge and awareness as to what took place on that day?

A I believe it was around noon that the people started assembling at the Finley, Kumble main conference room; and -- it was completely packed. There were just people representing a lot of the specific parties there and the limited partners and subordinated lenders and general partners were there, attorneys appeared for everybody, and there was -- I had been to one or two closings before on corporate matters and that had involved half a dozen people but this was really a -- looked like an enormous event, and I had a relatively small participation in that closing, and spent less than 20 percent of the time at the closing personally.

I visited with some clients in New York, had lunch, met a couple of the I believe, subordinated lenders, for the first time; and it turns out they were from Roslyn, Long Island, I believe, where I came from, and we went out and spent a couple of hours together at lunch and talked, and when it was necessary, I showed up again and signed some papers with regards to my stock and with regards to my employment agreement, and with regards to the releases we were signing.

I didn't get into any of the substantive conversations of any sort.

Q Were you present at any time during that day when the topic or subject of the rendering of an opinion letter came up?

A No.

Q And you did sign, did you not, the agreement of February 11, 1971?

A Yes.

Q What happened or what did you do after February 11, 1971?

A Went back to California.

Q What position did you assume in the new entity?

A Well, I was -- my title was I was vice president in the new corporation, and for stock exchange purposes I was the I guess, chief executive officer.

As had been testified earlier, they wanted someone in that title with prior brokerage experience that they accepted, was acceptable to them.

I also had the title of chairman of the executive committee, but primarily working in the Los Angeles office as a registered representative, and I received no salary from the corporation. I was like any other registered representative, and I received no salary from the corporation. I was like any other registered representative. I received commissions for the business I did with my individual clients.

Q You sat here Mr. Kayne, during Mr. Risher's testimony and Mr. Muh's testimony about the circumstances of the capital investments of $10,000 and the quantity of stock and all that type of testimony.

In order to push your testimony along, do you recall the testimony that Mr. Risher gave, the testimony that Mr. Muh gave, on this subject?

MR. MANDEL: I am going to object to that your Honor.

THE COURT: Yes, I fear I must sustain it even though it is -- specifically what are you after here?

MR. SILFEN: Well, Mr. Kayne invested -- paid

$10,000 for his capital stock. He got the same voting, same percentages, and rather than ask him all in dialogue I just wanted to rush all through that.

THE COURT: Is that so?

THE WITNESS: Yes, sir.

THE COURT: Very good. I will take it in that form. Go ahead.

You and Risher and Muh all had the same participation, is that it?

THE WITNESS: Yes, but different motivations.

THE COURT: But the same participation?

THE WITNESS: Yes.

THE COURT: All right, go ahead. How about Mr. Sloane? Had he the same participation?

THE WITNESS: No.

THE COURT: He had different. All right.

Q Did a time come, Mr. Kayne, when you became aware of or advised that the lawsuit that Mr. Sloane and yourself had commenced in California was in fact actually commenced?

A Yes.

Q When for the first time did you find out that the lawsuit had been filed?

A I believe shortly after it was filed.

Q Do you know the date that it was filed?

A Yes, it was filed February 3, 1971.

Q Did a time come when you were advised or informed that Mr. Gross had in fact been served with a copy of the complaint in that lawsuit?

A No, not until -- I was never advised of when it was served until you asked me to find that date, about a month ago.

Q All right.

MR. SHAW: May I have that date again; February 3rd? Could I have the date again, your Honor? I was distracted.

MR. SILFEN: Filed February 3, 1971. Mr. Kayne's awareness when it was served came about in June of 1975 at my request.

Q Jumping ahead now, Mr. Kayne, did you continue to perform the title duties ascribed to you by the new entity beginning with February of 1971?

A I would say you first had to define what the duties were and who was doing what and I don't think that came for a month or two later.

Q Just briefly describe what your duties and responsibilities were with the new organization at the time that those duties and responsibilities first became defined.

A Well, when we met and we talked about it among our new board of directors it was pretty well agreed that Paul Risher and Bob Muh would handle the operations on the east coast, and generally handle the overall financial operations of the firm, and that Chuck Sloane and myself were to concentrate on the west coast.

My primary responsibility, other than my own individual business which I was urged to do as well as I could, and that's the way I was getting paid, so that was of big interest to me. My primary area of responsibility was in investment banking on the west coast, corporate finance, underwritings, mergers, and private placements, and to try to bring in revenue, business for the firm in that area.

Q During the course of your three weeks here, Mr. Kayne, you have heard several references to two different types of situations, and I would like to take them with you one at a time.

You have heard several references to the Rafkind situation. Did you in January or February or March of 1971 have any knowledge, information, or belief as to a problem or situation involving Rafkind & Company with Charles Gross?

A Absolutely no knowledge.

Q You have sat here for three weeks and heard mentioned several times about the Buckley claim. Did you in

January or February or March of 1971 have any knowledge, information, awareness or belief of and concerning that claim?

A In December and January I had no knowledge. I cannot say for absolutely sure that I had no knowledge in February. I heard Mr. Risher testify that there was a meeting or a discussion with members of the executive committee I have no recollection of discussing that or knowing about that Buckley matter and that meeting.

However, I have no recollection that I didn't discuss it with him either.

Q I'm sorry?

MR. MANDEL: What was the last word?

MR. SILFEN: I have no recollection that I did not discuss it at the meeting.

Q Getting back to your lawsuit and the lawsuit of Mr. Sloane, did a time come, Mr. Kayne, when Mr. Sloane and yourself were advised that the California federal court had taken certain steps or made certain decisions with respect to that lawsuit?

A Yes.

Q Do you recall approximately when you were so advised and tell the Court what you were so advised.

A We were advised that in approximately September or

October of that 1971, that the federal court had ruled dismissing some parts of our complaint and ruling that other parts of our complaint were -- should be tried in the arbitration -- under the arbitration procedure of the New York Stock Exchange.

Q Did you have a meeting with your counsel at that time?

A Yes.

Q What transpired at that meeting?

A Well, they explained to us the substance of that, and --

MR. MANDEL: Your Honor, I am going to object on the ground that it is not relevant, that it is hearsay.

MR. SILFEN: If your Honor please, I believe it is relevant because at the time of this dismissal, bearing on the issue of motive and good faith intention with respect to this very lawsuit, which is claimed to have been maliciously motivated, the testimony I believe has already been that there was an alternative for these people to take, stop or go, and I think that is relevant.

THE COURT: I will permit it. Go ahead.

MR. SILFEN: -- on the issue of good faith.

Q Go ahead.

THE WITNESS: What was the question again?

THE COURT: When you learned of this decision in California, did you meet with your lawyers and what did you talk about?

THE WITNESS: Well, they told us that essentially what had happened with regard to the decision, and they told us that if we wanted to go forward, that this was a matter for arbitration, that we would probably be better served on a dollar basis to use some New York counsel for that, and they thought that their services had basically come to an end, and they wanted to get paid.

Q Was a decision made by Mr. Sloane and yourself at that time on how to proceed or not to proceed?

A Yes, we decided to proceed and proceed in arbitration against Mr. Gross.

Q Without going into a great deal of facts and figures, Mr. Silverman has already testified about the length of the arbitration, the sessions, the hearings, and did a time come, Mr. Kayne, when you were advised that the arbitrators had rendered a decision in that arbitration?

A Yes.

Q Do you recall when you were so advised?

A No. Some three years later, two and a half years later, after we started it, but I don't recall the exact date.

Q Were you personally present at the arbitration sessions?

A Well, there were 24 of them, and I was present at probably more than half of them, but either Sloane or I were present at most all of the sessions.

Q And by the way, Mr. Kayne, did a time come when you terminated your relationship with the corporation?

A Yes, I terminated my relationship -- well, there were two stages.

I terminated my stock ownership in the corporation in February of 1971, approximately a year after I bought my stock.

And about six or seven months after that, I left Newburger, Loeb entirely and resigned from the firm, became a registered representative somewhere else.

Q In order to move the testimony along, you were present when Risher testified about the circumstances of the sale of your stock to Mr. Risher, and when Mr. Muh testified to the circumstances under which he sold his stock to Mr. Risher.

In order to move the testimony along, if I asked you the same questions, would your answers be the same?

MR. MANDEL: I object to that.

Q That is, on the question of --

MR. MANDEL: I object to that.

MR. SILFEN: It is the same circumstances, Judge, same reasons.

THE COURT: In a nutshell, can you tell us? You sold your shares to Mr. Risher.

THE WITNESS: Yes, sir, I told my shares to Mr. Risher, Mr. Crawford, Mr. Wilbur.

THE COURT: How much did you get?

THE WITNESS: I got $400,000 in cash of which I gave Mr. Muh $100,000 and took $100,000 of his notes that he received from Mr. Risher.

THE COURT: All right.

Q Just give us the date that you terminated as a registered representative with Newburger, Loeb.

A I believe it was September or October of 1972.

Q And it has been established, Mr. Kayne, that the arbitration that is in evidence now terminated some time in 1974, and I ask you whether or not at the conclusion of that arbitration, you were asked by your counsel to submit a detailed statement of legal expenses, fees and expenses?

A Yes.

Q Now, I am going to show you a document which is dated March 7, 1974, consisting of three pages, which has been previously marked as additional Defendant Kayne Exhibit A for identification; and ask you whether you are familiar with this document.

A Yes, I am.

Q Could you tell the Court whether or not you prepared that document?

A Yes, he prepared it, Chuck -- Charles Sloane and I both prepared it from our bills and from all the receipts that we had with regard to this entire arbitration.

Q And is it your signature which appears on the first page?

A Yes, it is.

Q Do you recognize the other signature which appears on the third page?

A Charles Sloane.

MR. SILFEN: I now offer this your Honor as Additional Defendant Kayne's Exhibit, next exhibit.

MR. MANDEL: I believe it is irrelevant.

MR. SILFEN: Your Honor, I believe it is relevant on this issue.

THE COURT: It seems to me it is some evidence for the trier of the facts to consider on the bona fides of the suit so I will overrule that objection.

(Additional Defendant Kayne's Exhibit A was received in evidence.)

THE COURT: The total fees were somewhere, what,

$17, 000? Is that it?

THE WITNESS: Yes, legal fees and costs of flying in witnesses.

MR. SILFEN: It totals about $28,000, your Honor; on the third page, at the bottom, fees and California.

THE WITNESS: All those arbitration hearings were in New York City, so we had to come in each time.

Q All of the fees and expenses listed on Exhibit A, have they been paid?

A Yes, sir.

Q Who made those payments?

A Chuck Sloane and myself made every payment.

Q Was there any agreement between Mr. Sloane and yourself and any third party that you would be reimbursed or indemnified for any of those fees and expenses?

A Absolutely not.

MR. SILFEN: I have no further questions.

CROSS EXAMINATION

BY MR. GRUTMAN:

Q Mr. Kayne, you testified that you consulted California counsel in California during the first week of January, 1971. Am I correct about that?

A That's correct.

Q Was the counsel that you went to see recommended to you by Finley, Kumble?

A No.

Q Or by anybody connected with Finley, Kumble?

A No.

Q If you saw the counsel during the first week in January of 1971, do you recollect when it was that you called to arrange for the appointment which you had the first week in January?

A I do not recall now.

Q As of December 31, 1970, did you believe that Charles Gross' signature on the transfer agreement was required?

A As of a few days later when I heard of that meeting I was told his signature was not required.

Q All right, fine.

As of the time that you saw the lawyer in Californi did you know that Mabel Bleich had signed the agreement of December 31, 1970?

A Yes, I knew all the limited partners had signed it.

Q Did you know that as of December 31, 1970, Golenbock & Barell, representing Jeanne Donoghue, had expressed a recommendation that the agreement of December 31, 1970, was in Jeanne Donoghue's best interest and that they would urge her to sign it and approve it?

A I thought she had signed it.

Q At the time that you went to see the lawyers and did see them in January of 1971, did you have any knowledge or any inkling that either Bleich or Donoghue would refuse to go along with the transfer agreement?

A No.

THE COURT: Where did you get the information that Jeanne Donoghue had signed?

THE WITNESS: I had thought that when I spoke to Mr. Muh after the meeting in early January, that everyone -- all the limited partners had gone along with the signatures.

THE COURT: I see.

Q And that conversation which you just referred to in answering his Honor's question, was that conversation with Mr. Muh a conversation that you had with him before you saw counsel in California?

A I believe it was immediately after the December 31 meeting, which I doubt if it was New Year's Day, but the day after, I would say, yes.

Q Very well.

In answer to another question his Honor asked you, you said that at this meeting you had with Mr. Gross in New York, you did not tell Gross you would relinquish the claims you were asserting against him if he would agree to withdraw any opposition to the reorganization; is that what you told his Honor?

A That's correct.

Q Did you tell Gross at that meeting at the restaura in January of 1971 that whether he went along with the reorganization or not, you and Sloane had intended to press your claims against him for Gross' wrongdoing in inducing you to come into the Newburger, Loeb partnership?

A I don't think I tied it in in any way with the transfer agreement. I don't think these would be my words. I think I just told him what our grievances were and we intended to press our grievances.

Q So far as your interpretation then and state of mind was concerned, when you met with Gross in January of 1971, did you think the grievances that you and Sloane were asserting against Gross were in any way tied in with the transfer agreement?

A No.

Q And you discussed what you would say to Mr. Gross on January 23rd with either Robert Persky or any other lawyer from Finley, Kumble?

A No.

Q Am I correct that Finley, Kumble and Robert Persky had something to do with either the bringing of the case that you and Sloane started in California against Gross or its prosecution?

A The bringing of the case in California. However, in the arbitration in New York, when we were looking for lawyers in New York to handle the arbitration, it was the Finley, Kumble firm that recommended the firm in New York that we used for our --

Q When did you ask Finley, Kumble for your lawyer or recommendation of one?

A Prior to filing the arbitration papers in October of 1971.

Q Long after the transfer agreement had been history, correct?

A Yes.

Q And in that arbitration proceeding, was it a lawyer from a firm other than Finley, Kumble who represented you and Mr. Sloane?

A It was two lawyers.

Q Who were they?

A Donald Sicklen -- Bob Sicklen and Donald Laventhal.

Q Were they partners?

A Yes.

Q In a firm other than Finley, Kumble?

A Yes.

Q Did you pay any fees to Finley, Kumble for the representation of you and Mr. Sloane in the arbitration?

A No.

Q Or for any services performed by any counsel in the work that was done in California?

A No.

Q Do you recollect having received a telephone call from Mr. Persky at any time in January of 1971 wherein he reported to you on the outcome of certain conversations that he had had with Phillip Mandel?

A Yes.

Q Do you recall whether that was January or February or when it was that you got that telephone call?

A I believe it was in January.

Q Do you recall what Mr. Persky told you?

A In fact, I am sure it was in January because it was before my going to New York to meet with Mr. Gross.

Q That was on the 23rd?

A Yes.

Q When Mr. Persky spoke to you, did he tell you to come to New York to speak to Gross?

A No.

Q What do you recall Persky told you in the telephone conversation in January, as you recollect it?

A The best I can recall is that he told me that he had just come from a meeting with Bob Muh and Paul Risher, they had met with Mr. Gross at his attorney's office and that was the first time I heard the name Phillip Mandel.

Q Did he tell you what position Mr. Mandel had advocated?

THE COURT: No, let us ask him what he told him.

Q Fine.

What else did he tell you was said at that meeting?

THE COURT: No, no, what did he tell you in the phone conversation?

THE WITNESS: In the phone conversation he told me briefly that they met with Mr. Gross to give the arguments or persuade Mr. Gross to participate in the transfer, and it was at that meeting that it came up for the first time to my knowledge, that Mr. Gross and Mr. Mandel had told them that Mrs. Bleich and Mrs. Donoghue might not go along with the agreement. And I recall that that was the first time that I had ever heard that. And I recall that --

THE COURT: Mr. Persky was telling you this over the telephone?

THE WITNESS: Yes, over the telephone.

I recall that was the first time I had ever heard that, and I believe I asked him, "What does that do to the transfer agreement?"

He said, as best as I can recall, that everything should still go through as long as the other limited partners did not balk at signing the agreement because two limited partners would not be going along, if in fact they would go along.

Q Did he tell you anything else?

A No, that was it.

Q Have you now exhausted your recollection as to what Mr. Persky told you about that meeting?

A Yes, as best as I can recall.

Q Do you have a recollection of what you said to Mr. Persky in that telephone conversation and he conveyed to you what you have just related to us?

A I also conveyed what I said to him, with regard to the new event of Bleich and Donoghue not going along and what effect that had on the transfer agreement not yet through.

Q You used the verb form that Persky told you they might not go along. Is that what he said?

A Yes, he did not say that they definitely would not go along.

Q Before Persky went to the meeting with Mr. Mandel, had you had any discussion with Persky concerning the forthcoming meeting of January 15th?

A No, I had no knowledge there was a meeting.

Q At any time up until January 15th, had you instructed Persky to lean on Mr. Gross?

A No, I gave Mr. Persky no instructions of any sort.

Q At any time did you enter into a conspiracy with Mr. Persky or Finley, Kumble to do anything to deprive Charles Gross, Mabel Bleich, or Jeanne Donoghue of what their claimed capital interest in Newburger, Loeb & Company was?

A No.

Q Did you enter into a conspiracy with Robert Persky, Finley, Kumble, or anybody else, to bring baseless lawsuits against Charles Gross, Mabel Bleich and Jeanne Donoghue, and to tie them up in litigation for many, many years?

A Absolutely not.

Q Mr. Kayne, did you enter into a conspiracy with anybody, whether it be Robert Persky, Finley, Kumble or anybody else, to do any of the acts that I just asked you about?

A No, but I went into a lawsuit with Chuck Sloane against Mr. Gross.

Q What was your objective in participating in the transfer agreement of Newburger, Loeb?

A My objective was not seeing the partnership go broke, and myself being a general partner and the after-effects I thought that would have on all the people that worked there any own financial position.

Q Based upon what you knew as of February 11, 1971, if the transfer agreement had not been consummated, would the partnership have gone broke?

MR. MANDEL: I object to this.

THE COURT: Based on what you knew.

Q Based on the financial information which you had as of February 11, 1971, if the transfer agreement had not gone through, what would have happened to the partnership of Newburger, Loeb & Company?

A I think the partnership would have gone broke because it could not pay all its liabilities.

Q Would that have adversely affected you?

A Oh, yes, sir, definitely.

Q And the employees?

A All. We were out of business.

Q And the limited partners?

A It was my belief that all the limited partners would have been wiped out.

Q As well as the general partners?

A That's correct.

MR. GRUTMAN: No further questions.

MR. SHAW: Just to pick one thing up.

CROSS EXAMINATION

BY MR. SHAW:

Q In what respect would the financial effect have been felt on you most particularly? Do you understand my question?

A No.

Q You indicated that you were concerned at one point with the continuation of the partnership through the end of the year 1970, correct?

A That's correct.

Q And who did you indicate that to?

A Bob Muh.

Q And at that point why were you concerned to see that the partnership would at least continue through the end of the year 1970?

A I think I indicated that to people, but which was either before I went on my trip to the Caribbean or shortly after I came back, I just thought it was the partnership would be hard-pressed to live another month, and my feeling was that the more time it could live, the more chance there was that I might be spared the financial holocaust I saw coming.

In answer to your question, there was no specific thought in my mind about December 31st from a legal standpoint. I didn't have any understanding I was better off a month later than a month sooner.

Q You used the word or you said in your testimony that you had something called partnership liability. What did you mean by that?

A I had always felt that the general partners were jointly and severally liable to creditors.

Q Were you particularly concerned with any class of creditors in the event that partnership went out of business?

A I didn't get that specific. I just --

Q Just let me ask you, I have a series of points:

Have you at any time discussed the testimony that you would be giving in this trial with anybody from my office or Mr. Grutman's office?

A No, I believe the only time was one day you asked me what I knew about a particular claim or not, and I said I didn't know anything about it.

Q That's in this courtroom?

A That's correct.

Oh, and the Finley, Kumble office were my attorneys at this -- up until they resigned in --

Q Correct.

A In the spring of 1974.

Q Since that time, have you had contact with the Finley, Kumble firm with respect to the testimony or the facts of this case?

A No, the only contact I had was when Mr. Grutman called me in California to see when I was coming to New York, and to discuss the --

Q And have you had any --

MR. MANDEL: Wait a minute. Let him finish the answer.

Q Go ahead.

A And to discuss my coming to New York.

Q Anything further?

A They asked me to come sooner.

Q Since October or September of 1972, have you had any conversations or discussions with Mr. Risher or anybody from Newburger, Loeb Corporation?

A Since what date? October of '72?

Q Since September or October of 1972, when you left the employ of Newburger, Loeb Corporation, have you had any any contact with Mr. Risher or anybody connected with the corporation with respect to the facts of this case?

A Well, Mr. Sloane was employed much after I left and I -- I talked with him about the big case.

Q Anybody else?

A I did talk with Mr. Risher, but it was not about the case. It was about the litigation between you and Mr. Muh.

Q When you were first contacted by Mr. Gross in September of '69 to go with Mr. Sloane about becoming possibly a partner in Newburger, Loeb, were you advised of anything in relation to a back office problem?

A No.

Q And I ask you the same question with respect to the issue of any New York Stock Exchange restrictions in effect at that time or during that period against the partnership.

A No, absolutely not.

Q And in becoming a partner of Newburger, Loeb, was your decision motivated in any way by any balance sheet or financial statement?

A You mean did I become a partner because I saw a financial statement?

Q Yes.

A No, I wouldn't say that was my reason for becoming a partner.

Q Did you see a balance sheet or financial statement at or about the time you were making your mind up as to whethe you should become a partner?

A Yes, but it was an August balance sheet of '6[illegible].

Q August 1969?

A That's correct.

MR. SILFEN: Excuse me, Mr. Shaw. I am kind of confused about the scope of this type of examination. It does not seem to have anything that I talked about.

THE COURT: What is the relevancy of this, Mr. Shaw?

MR. SILFEN: I don't want there to be any doors open that I haven't spoken about.

MR. SHAW: It is going to relate to something else your Honor, that is involved in one of our counterclaims.

MR. SILFEN: I kind of think it is very improper at this time for Mr. Shaw to ask these type of questions of this witness, something to do with a counterclaim.

MR. SHAW: Isn't this witness going back to California?

MR. SILFEN: Maybe so.

MR. SHAW: I think I am going to insist that he stay then.

THE COURT: Why don't you come up here, and I will see what is involved and how long it is going to take.

(Discussion off the record.)

THE COURT: I will sustain Mr. Silfen's objection. It is outside the scope of direct examination.

Q Mr. Kayne, you indicated that you had a share, as a result of becoming a partner, in the profits and the losses. Do you remember that testimony?

A That's correct.

Q Can you clarify that for me?

Is it your testimony that, by virtue of your becoming apartner, it was your understanding that the only thing that you had a share in or interest in was in the profits and losses of Newburger, Loeb after you became a partner?

MR. MANDEL: I am going to object to that.

MR. SILFEN: Objection. Same thing, outside the scope of my direct.

MR. SHAW: That was a specific question that was asked.

THE COURT: Somebody asked him what his share was. I will overrule that.

MR. SHAW: It was Mr. Silfen.

MR. MANDEL: Yes, Mr. Silfen asked him if he thought he had a share.

THE COURT: Yes, overruled, go ahead.

Q Is that the only thing you had an interest in?

A Well, I woul say yes. I had an interest of cours in my capital account. My capital account is an account kept in the firm. If I get profits, the profits accrue to my capital account, and they are distributed on a certain basis. If I have losses, it is deducted from my capital account, but if I was a withdrawn partner, they give me back my capital account.

Q Minus the profits?

A Profits or losses, whatever the accounting shows.

MR. MANDEL: The other way around.

Q Well, your capital account would be minus the losses and added by the profits. I'm sorry.

A Right.

Q With an understanding if any did you have with respect to who owned the furniture and fixtures and assets and other things of the partnership.

MR. MANDEL: Your Honor, I believe this is irrelevant, calls for a conclusion of law.

Q In addition to the profits and losses.

THE COURT: Let me hear the question.

(Question read.)

THE COURT: To what is that relevant?

MR. SHAW: I think it is relevant, your Honor, to the interpretation of the partnership agreement.

THE COURT: That wasn't put in issue with this testimony. I will sustain the objection.

Q Did you become a partner in Newburger, Loeb at the same time as Mr. Rubin?

A Yes, I did.

Q In addition to you and Mr. Rubin and Mr. Sloane becoming partners at that time, did anybody else become a partner?

A There were five of us. Louis Bracker was one and I don't recall who the other one was.

Q Were you present at any time when the representations which were made to you were made to Mr. Rubin?

A No.

Q All right.

You testified that there were various efforts on your part to induce the deficit parnters to make up their deficit, and this was at a point when you were, I believe, attempting to put through a plan whereby a corporation which you would form would acquire the assets and leave the liabiliti of the partnership with the partnership; is that correct?

A No, it is not correct.

I said -- the comparison in time was correct. The going along with the assignments for the partnership was correct. It was at the same time when I was trying to get a concensus on the creation of the new corporation, but that new corporation would buy the assets and certain liabilities. Those liabilities were spelled out in that exhibit, that two-page exhibit, to not leave all of the liabilities with the new partnership.

Q In your efforts to induce the partners who had deficit capital positions to make up their deficits, did any of them give you the reason why they did not want to do this?

A Some of them said they didn't have any money. Some ofthem said that they didn't want to put any money in. Some of them didn't give me any reason.

Q All right. Let me ask you one further question, and if Mr. Silfen objects to this, I am going to have to ask you to stay here:

Was there any conversation between you and any of the partners of Newburger, Loeb with respect to a trading account being handled by Mr. Gross?

MR. MANDEL: I object.

MR. SILFEN: I object.

MR. SHAW: All right, that's one area.

THE COURT: Sustained.

Q Was there any conversation between you and any partners of Newburger, Loeb with respect to the lease at One New York Plaza?

MR. MANDEL: I object. Got nothing to do with the direct.

MR. SHAW: Correct.

THE COURT: Sustained.

Q I ask you the same question with respect to the decision to employ Mr. Bracker.

MR. SILFEN: Objection.

THE COURT: Sustained.

Q And I ask you the same question with respect to the issue of who was responsible, if anybody, for the censure by the New York Stock Exchange on or about July 23, 1970, and the fine of the firm of $50,000?

MR. SILFEN: Objection.

THE COURT: Sustained.

MR. SHAW: No further questions.

MR. MOSS: Your Honor, I have marked as General Partner's Exhibit A, for identification a document and I want to show it to the witness.

(General Partner's Exhibit A was marked for identification.)

CROSS EXAMINATION

BY MR. MOSS:

Q Mr. Kayne, I show you a document and ask you if you received and receipted that document?

A Yes, this is my signature acknowledging-receipt.

MR. MOSS: I offer it in evidence.

MR. MANDEL: No objection.

MR. SILFEN: NO objection.

MR. ESTERMAN: Do you have the date of that?

MR. GRUTMAN: November 10, 1970.

(Additional Defendants General Partners' Exhibit A was received in evidence.)

MR. MOSS: That's all.

THE COURT: Mr. Mandel?

MR. MANDEL: I'm sorry, that was all?

THE COURT: That's all.

MR. MANDEL: Is this a good time for a recess, your Honor?

THE COURT: Well, maybe we better take two, since we are going to go to close to 5.

MR. MANDEL: Yes.

THE COURT: All right, we will take a ten-minute recess at this point.

(Recess.)

CROSS EXAMINATION

BY MR. MANDEL:

Q Mr. Kayne, do you recall your prepared remarks of August 24th?

A Yes, sir.

Q You testified about them on direct, and you said on direct, if I am right, that you did not aim them at any specific person, and you were careful not to do that, because you wanted to be friendly and conciliatory, but in fact a number of people afterwards indicated that they thought it had been aimed at them. Do you recall that testimony?

A I don't think those are my exact words, sir.

THE COURT: But that is the substance of what you said?

THE WITNESS: Yes.

THE COURT: All right, go ahead.

Q Who are the people who later indicated to you that they thought your prepared remarks were aimed at them?

A Merely two people, Bob Newburger and Andrew Newburger.

Q You also had in mind Charles Gross in those remarks, did you not?

A Do you mean was Charles Gross one of the people that came in to me afterward?

Q No. You told us that only Andy and Bob Newburger came to you and said they thought you had been aiming at them, right?

A Yes.

Q Charles Gross did not come to you?

A That's correct.

Q But did you have Charles Gross in mind when you had the prepared remarks read or when you prepared the remarks and read them?

A Yes.

Q Who else did you have in mind?

A The other members of the executive committee.

Q All of the members of the executive committee?

A Yes.

Q And maybe some of your other partners besides?

A Yes.

Q And you said in deposition that you wanted to reserve your right against all partners, is that correct?

A Yes.

Q And that was a recurring theme of yours, was it not?

A Yes.

Q Even when you resigned, in your letter of November 10, 1970, by General Partners' Exhibit A in evidence, the last paper that was --

MR. GRUTMAN: He didn't resign. That is Settel's resignation.

MR. SILFEN: It is Mr. Settel's resignation.

MR. MANDEL: All right, excuse me.

I withdraw that.

Q When Mr. Settel resigned pursuant to General Partners' Exhibit A in evidence, did you have a discussion with him about that?

A No, I don't think so.

Q When did you resign?

A I testified yesterday that I resigned in the first week in November, I believe, November 5th, effective November 30th.

Q You resigned twice in fact, did you not?

A I testified to that yesterday; yes, sir.

Q Is it true that you resigned because of the disastrous capital situation of the partnership in part?

A In part, yes.

Q And isn't it also true that inbetween your first and second resignation, you committed the firm to enlarging or expanding the California office?

A Yes, that was a profitable thing for the firm, yes.

Q How much capital did you commit to that project?

A Capital committed to that project? Well, I think the way we viewed it at the executive committee meeting when we all discussed it was that there was no capital committed to that project, that in fact the entire floor -- well, let me explain just what happened since you are inquiring -- is that Newburger, Loeb in California had sublet 7,500 square feet of a total of 15,000 square feet. The other 7,500 square feet was sublet by Class A tenants, another brokerage firm, a couple of Class A companies, Bardahl was one of them, another firm I don't remember.

The one firm wanted to give up the master lease for the whole floor, and Newburger, Loeb at that time assumed the master lease for the whole floor and by taking over that master lease, actually picked up a net inflow on a monthly basis of $1,500 a month.

The risk of having the additional subtenants on was a risk to Class A tenants. It was considered an outstanding risk by everybody at that executive committee, of which I was one.

Q For how many years did Newburger, Loeb commit itself on this master lease?

A I don't recall.

Q For quite a few years, more than five?

A I believe there were some options in there, yes.

Q Now, does this particular master lease figure on the five schedules of master leases that have been put into evidence here as obligations of Newburger, Loeb hanging over the partnership?

A I have not seen that schedule that was put into evidence here, so I can't answer your question.

MR. MANDEL: May we have your Exhibit K, Kayne's Exhibit K, Mr. Silfen?

MR. SILFEN: It is up here in the front, Mr. Mandel. I will find it for you.

Q Does that particular lease appear on Kayne K?

A Yes.

Q And what liability does it show?

A It shows a $60,000 annual rent for 7,600 square feet expiring in 1979.

Q All right.

Was there also space in Beverly Hills to which the partnership was committed at the same time? Do you recall that?

A I don't think at the time that schedule was prepared, that -- I think negotiations were already on with Mr. Bracker, who had that space, to terminate that space.

Q When was the schedule prepared?

A That's my handwriting on the top, so that would have been probably when I was managing partner, and I would have asked for that to be prepared and it was probably done in

August or September of 1970, yes, sir.

Q Do you see the Beverly Hills space entered on the exhibit?

A Mr. Mandel, there is a cancellation clause here, 8/31/1970. That was cancelled.

Q Cancelled as of that date. All right.

When you left the partnership and went to California, you went back personally to work as a registered representative in the Century City office, is that correct?

A You're talking in December when I returned to California?

Q Yes.

A Yes, sir.

Q And after the transfer agreement, you went back to Century City office again, is that correct?

A I never left the Century City office, yes, sir.

Q And you were interested in maintaining Newburger Loeb's position in the Century City office, were you not?

A Are you saying my position in Newburger, Loeb in the Century City office?

Q Your position, your personal situation was helped by the existence of that office, was it not? Do you deny that?

A I don't think it was helped or hurt, sir.

Q You testified on direct that when you purchased stock in the new corporation for $10,000, your motivation was different from that of Muh and Risher, is that right?

A Yes, sir.

Q Did you intend to say by that that you didn't buy the stock with any expectation of gain; you thought the stock was worthless?

MR. SILFEN: I object to the form of the question, your Honor. He can ask him what was his motivation.

THE COURT: No, this is cross examination. I can either accept it or reject it.

Overruled.

A Could you read back the question, please?

THE COURT: Yes.

(Question read.)

A I would say my state of mind at the time I bought the stock was I bought it with no expectation of gain.

Q Did you think the stock was worthless?

A Yes, sir, I did.

Q Did you not recognize in any way that that $10,000 gave you enormous leverage in the event the business was turned around?

A On the contrary, I felt that the $10,000 investment, and this is where I differed with Mr. Risher and Mr. Muh

I felt that my investment gave me obligations, gave me an obligation to the New York Stock Exchange as against the guy they pointed the finger at. It gave me again as chairman of an executive committee a position of responsibility among two or three hundred people that worked for the firm, and again put me in a position of responsibility that I had to devote duties other than to make my basic commission business to producing revenues for the firm; so I thought long and hard about the negatives of going into that deal, rather than the positives.

Q It is true, nevertheless, that when you found out in December of 1970 that Mr. Risher had tried to cut you out of the deal while you were out of the country, I think I have got your exact words right, your supposed friendship with him came to an end?

MR. SHAW: Objection, there is no such testimony yet in the record.

MR. MANDEL: Well, I am talking about his --

MR. SHAW: Cutting him out of the deal. I don't believe the record supports that at this point.

MR. MANDEL: He can say yes or no.

THE COURT: I will sustain the objection.

MR. SHAW: The question has a premise in it. Let's not --

THE COURT: Sustained.

Q Did there come a time in December when you learned Risher had tried to cut you out of the deal?

A No, sir, there came a time in December when Risher did not want to include me in the deal.

Q When you learned that, your so-called friendship with Risher came to an end, is that right?

A I'd say that that is a fair statement, that I felt personally peeved that he thought that I didn't have any value as a businessman and as a person.

Q When you found out that he had tried not to include you in the deal, did your so-called friendship come to an end?

A I guess you could say that, yes.

Q And you did not speak to him from that moment, at least until February 11th at the closing, is that correct?

A No, I don't think that is correct. I think I spoke to Paul once or twice before that period of time, as best I can recall.

Q I go to 158 of your deposition. I have got to go back, I'm afraid, to 156.

A Excuse me, sir. You said 156?

Q Yes. And I am going to skip colloquy, and starting on line 4, page 156, the question was:

"Q You tell me."

And you said:

"A I would just say there were bad feelings developed. After I left New York, I had resigned from Newburger, Loeb Company partnership and left New York in December and during a period of time that ensued through the signing of the transfer agreement, essentially there were statements made by Mr. Risher to people about myself that I subsequently heard about, and I felt that at that particular point, that Ifelt that was the beginning of the end of our so-called friendship."

And I will skip a couple of questions, go to line 23 on page 156, with your answer:

"When Mr. Risher and Mr. Muh were asked by Robert Newburger to act on behalf of Newburger, Loeb partnership to try to put together a capitalization plan to keep the firm from liquidating, they were working towards the end of November and into December and I left New York in early December, had gone on a trip, and when I returned to Californi in the middle of December, I was told by Mr. Muh of this recapitalization plan that had been presented to the Exchange, to the partnership, and that Risher had argued strongly with Muh and the New York Stock Exchange that I not be included in any way, because I had resigned from the partnership and gone back to California; and that I be put in as a registered representative in Newburger, Loeb, but the recapitalization plan had been worked on and was being done, but it was his idea, Muh's idea"--that's a mistake, isn't it? You meant to say Risher's idea, right?

A Right.

Q "--Risher's idea that they should not include me."

And continuing:

"The New York Stock Exchange had felt that Risher and Muh did not have the qualifications and background to be head of a New York Stock Exchange brokerage firm, and coupled with the fact that Bob Muh strongly disagreed with Risher, I was included in the proposals, the later proposals to the New York Stock Exchange and to Bob Newburger, etc.

"I was unaware of all this transpiring because I was incommunicado for the two-week vacation in the Bahamas. Although I received a few phone calls down there, I never returned them -- excuse me -- it wasn't Bahamas, but it was Aruba."

I am continuing with your answer:

"So essentially that was the beginning of my bad feeling with Risher where I felt that -- I thought that my contribution to the corporation and my contribution as a businessman would have been valuable, and that he bruised my ego by dismissing any such contributions that I could have or I could make, and my conversations with him became" -- then you say, "I don't think I talked to him at any point up until the day of transfer, the transfer agreement taking effect.

"I had no reason to talk to him and did not talk to him."

Now, do you remember that testimony?

A Yes, it is my testimony.

Q Was it truthful?

A To the best of my recollection, yes.

Q So your recollection a little earlier was in error is that correct?

A I believe I testified today that I talked to -- I don't see any inconsistencies. I think I testified today --

Q I asked you if you did not talk to Risher again until the date of the transfer agreement, and you told me you thought I was wrong.

A I told you to the best of my recollection, sir, that I talked to him once or twice, I think that -- it could have been wrong or it could have been right.

Q All right.

Now, it is your testimony that your bad feeling with Risher was just because your ego was bruised and not because he was trying to cut you out of a very profitable economic opportunity?

A I'd say because my ego was bruised, yes.

Q And it is your testimony that you did not recognize a valuable economic opportunity in the transfer agreement for you?

A Sir, that is so true, because in the middle of December there was -- I mean there wasn't even the beginnings of a deal as far as I saw or knew. The situation was chaotic. I left it 15 days earlier when Mr. Muh told me that he had inserted my name, I thought I was being used as a basically a figurehead.

I didn't have any concept of a deal or what I was getting or what -- if there was any value or what have you.

Q And you didn't ask? You just went ahead to be a figurehead without any interest in what you were getting and what you were giving? Now, Mr. Kayne --

MR. GRUTMAN: Can he finish? There is a question there.

A Was your question then I didn't ask? No, sir, I didn't ask.

Q When did you find out what you were getting and what kind of figurehead you were consenting to be?

A Some time before the end of December I found out the nucleus of the deal, what they were proposing with regard to the subordinated lenders, limited partners and I found out about the $1,000,000 of capital from a Cuban, and I found out that they were going forward on a deal to deal with every party.

Q That was Persky who told you about Aixala, wasn't it?

A I don't recall. It could have been.

Q You stayed in touch with Persky, did you not?

A Yes.

Q Coming back to the prepared remarks of August 24th when you were asserting claims against all your partners, Persky and Bamberger helped you prepare those remarks, did they not?

A No, sir.

Q In no way?

A No, I testified in my deposition, and I testified again here, or I will testify again here if I haven't said so, that I prepared those remarks, and I believe that either Bob Persky or Mike Bamberger or Ned Frank helped me edit them. And I have subsequently thought and thought and thought about that, and I believe it was Mike Bamberger that helped me edit some of the remarks.

Q And the remarks were typed up at Finley, Kumble?

A Yes, I believe that is true.

Q And who got the legal stenographer who attended the meeting of August 24th when you read these prepared remarks to a legal stenographer in front of all your partners?

A I have no idea who got her. I assume it was somebody at the law firm.

Q Of Finley, Kumble?

A Yes, that's where it was, yes.

Q So Finley, Kumble was then the partnership's law firm, is that correct?

A In August 24th I believe I introduced them as special counsel to the partnership because the agenda at that meeting had not yet voted on the termination of the retainer agreement of Golenbock & Barell, so once that was voted on at that meeting on August 24th, it was shortly thereafter that Finley, Kumble was in fact retained by the partnership as their full-time outside counsel, yes, sir.

Q Did anybody from Finley, Kumble attend when you read those prepared remarks to your partners?

A I believe the prepared remarks, and if you can give them to me I can refresh my recollection, the prepared remarks introduce Robert Persky to all the members of the executive committee.

Q So Persky was present?

A Yes, sir.

Q And Finley, Kumble typed the document, Bamberger helped edit it, and you put all of your partners on notice that you had claims and you weren't giving them up and you might sue all or any of them?

MR. SHAW: Objection, your Honor, that's argumentative.

THE COURT: No, I am going to permit that.

A I believe a secretary at Finley, Kumble's office typed the remarks. I believe that Michael Bamberger helped edit them. The thoughts were mine.

I believe Bob Persky was present; and I read it in front of all the partners of the old executive committee and the new executive committee, yes, sir.

Q What claims did you have against all of your partners in August of 1970?

MR. SHAW: Objection, your Honor.

THE COURT: Overruled.

A I don't believe I asserted any claims against any of my partners in August of 1970.

Q What claims did you have in mind when you said you weren't giving up your rights to sue all or any of your partners?

A Sir, I testified yesterday that I wasn't making any claims of all my partners or any of my partners, but I was setting down, trying to set down for the record a statement of facts, a statement of what I had uncovered, a statement of some things that might even be proven wrong later on.

I had only been in New York three weeks.

Q So what did you have in mind that might give you claims against your partners?

A I didn't have in mind in August to assert claims against any of my partners.

THE COURT: What claims did you have in mind? Whether you had in mind to assert them or not, did you have any claims in mind?

THE WITNESS: I don't think so, sir.

Q So without any claims in mind, you wanted to warn everybody in the partnership that you weren't giving up any claims?

A That's correct, or any rights. I didn't know what rights I might have yet.

Q And as far as you knew, at that moment, you had no rights against anybody, is that what you're saying?

A I'd say not completely. I had a good feeling that if I were to have stopped everything I did right then, and going forward as a business man, and I stopped and I started to -- went to a lawyer, got my own personal attorney and fed him in the fact that I knew at the time and then spent the rest of the month trying to dig up new facts, that I could come up with some claims against some of my partners, yes,sir, I felt that.

Q All right.

Which partners did you feel you had claims against?

MR. GRUTMAN: Now, your Honor, that's speculative because the preceding answer speaks about a state of --

THE COURT: Sustained. Sustained.

He said he could work up some claims if he went at it.

Q So in August you hadn't yet made up your mind whether you were going to try to work up any claims against your partners?

A No, sir, I had made up my mind I was not going to work up any claims against my partners. I was going to go forward as a businessman in August.

Q But you wanted to reserve your claims?

A My right.

Q For future use, if things didn't go the way you wanted them, right?

A If they proved out to be correct, if the facts continued to unfold, and things of that nature. I had only been there three weeks.

Q Ultimately, you never asserted any claims against any partners but Gross, is that correct?

A That's correct.

Q But you learned and knew of other claims which you could have asserted against other partners?

A That may be correct.

Q What other claims did you learn of that you could have asserted against other partners?

MR. SHAW: Objection.

THE COURT: Overruled. He may answer.

A Primary claim I ended up pushing so hard against was the only claim that I felt very strongly about personally, so did Mr. Sloane, and that was the claim of fraudulent inducement into the partnership and misrepresentation up to February, 1970.

The claims afterwards, after February of 1970 personally, I'm talking about what the corporation and the partnership may have individually among themsevles, was not something that ultimately personally came down to offend me.

MR. MANDEL: I move to strike on the ground that the answer was not responsive.

MR. SHAW: Objection, your Honor, I think the answer was responsive.

THE COURT: Let me hear the question.

MR. SAHW: He asked what claims and he answered some claims.

THE COURT: Let me hear the question.

(Question read.)

MR. MANDEL: That means besides Mr. Gross.

THE COURT: What is the answer?

(Answer read.)

THE COURT: Strike the answer out. It is not responsive.

THE WITNESS: I'm sorry, Judge. Could you read the question back again?

THE COURT: It was what other claims did you have against other partners besides Mr. Gross.

Q Than Mr. Gross.

A At what period of time?

Q At any period.

A Well, your question is what claims did I have against other partners and I felt that the only claim I wanted to assert -- the only claim I had --

THE COURT: No it isn't a question of asserting.

MR. GRUTMAN: Let him answer.

A The only claim I had against other partners was the claim of my fraudulent inducement into the partnership.

Q Who besides Mr. Gross made those fraudulent inducements to you?

MR. SHAW: Objection.

THE COURT: Overruled.

A Well, the testimony in the arbitration was extensive in the area, and the -- there was the primary area and the total representation as to the financial condition, the omissions that were made, the one on one meetings, all of the representations with regard to capital, balance sheet, profits, were made to me by Mr. Gross, were made to Mr. Sloane by Mr. Gross.

I testified to this yesterday.

Now, the thing that further -- the thing that crystalized my thinking --

THE COURT: I think you have answered as far as you have gone.

MR. MANDEL: He hasn't answered my question. I move to strike. I said who besides Mr. Gross.

THE COURT: He said in effect Mr. Gross was the one. That is his answer.

Q Do you now say Mr. Gross was the only one who participated in the fraudulent representations to you?

A No, there were two other partners that came to that meeting in California, that sat there, made no negative comments when Mr. Gross said he -- made his claims. That was Mr. Robert Newburger and Mr. John Settel, and when Mr. Gross made his presentation to all the brokers at McDonnell, they didn't get up and say, "That is wrong, Mr. Gross, we are losin money and we are having a terrible time."

So in that regard, they didn't do the right thing, and as far as I was concerned, all my meetings from that meeti on and every representation I had was with Mr. Gross, every piece of paper I saw, every request I had, every discussion I had was with Mr. Gross.

Q What pieces of paper did Mr. Gross give you that you say were fraudulent?

A Mr. Gross and I used as a reference,as a balance sheet,the August 1969 balance sheet of Newburger, Loeb, the unaudited balance sheet. He had given that piece of paper to Mr. Sloane. He had made a representation to me continually through the fall of 1969 that the financial conditions of the firm were substantially unchanged from that balance sheet and in fact, the firm was profitable.

Q Who prepared that balance sheet, do you recall?

A I don't recall. It was Mr. Gross' managing partner who gave it to --

Q You don't recall who prepared it?

A I wasn't a partner. I was working at a different firm.

Q Do you think Mr. Gross prepared it?

MR. SHAW: Objection.

Q Did you ever get information about who prepared it?

A Mr. Gross transmitted it to us. I don't have any information who prepared it.

Q When did you find out for the first time that you had been brought into the partnership, as you say, by false pretenses?

A Probably in the fall of 1970; September or October, best I can recall, when it really came home to me that the firm was on substantial restrictions, and somebody showed me the actual restrictions.

Q That's when you decided you had been defrauded, right?

A Defrauded? I didn't decide anything about being defrauded. I thought I had been suckered, lied to, misrepresented to, and used as [illegible] fool.

Q When was that, in October?

A That was when I really decided it was. Before I thought I had been misled, and up through the meetings that I had at the executive committee meetings -- well, let's go right back --

THE COURT: Mr. Kayne, let's clear this up.

When did you first have an idea that you had been brought in by false pretenses?

THE WITNESS: When I sat and had a drink with Mr. Gross that night when he told me the partnership the month before had lost $200,000.

THE COURT: What was the date of that drink?

THE WITNESS: Beginning of April, 1970.

THE COURT: That's the first time you had an idea you had been brought in by false pretenses?

THE WITNESS: Yes, sir.

THE COURT: Now, earlier you said the fall of '70.

THE WITNESS: Well, through that spring and summer, the financial facts began to unfold; and then came my August 24th remarks where I laid the financial facts that I had uncovered on a personal basis in New York before the executive committee. After that, some time in September or October, someone essentially told me for the first time that in fact when Mr. Gross had been negotiating with Mr. Sloane and I, almost to the eleventh hour of those negotiations, to the few days before we were brought into joining the firm, the firm in fact had been on restrictions from the New York Stock Exchange and had been held back from hiring any new brokers for the firm; and it was only the day after they got released from these restrictions or shortly thereafter, that we joined Newburger, Loeb, but we were never told of that substantial problem.

And when I heard of that in September and October and realized that if I had been told that I might not have bee going through that at this time, and certainly not have invested the money and lost the money, so that was in September - October that I got a little upset, you might say.

Q You joined the firm in February, right?

A No, I joined it in January.

Q January?

A Yes, sir.

Q And when did you get the financial report for the prior fiscal year, prior year?

A I don't recall. It was some time thereafter.

Q About how long thereafter?

A I don't recall, sir.

Q When did you first complain to Gross that he had misled you?

A Starting in the spring of 1970 and talking with him through my visits to New York at the executive committee meetings.

Q Starting in the spring you were complaining that you had been misled.

A Discussing.

Q Did you say you had been misled?

A No, sir.

Q Did you ask if you had been misled?

A I think I asked "What is happening here? Why are we losing this money?"

Q Didn't you say in the August statement, and I am going to read it --

THE COURT: Wait a minute, Mr. Mandel.

MR. MANDEL: Pardon?

THE COURT: You said in the spring you discussed with Mr. Gross that you had been misled?

THE WITNESS: No, sir, I think I discovered for the first time that things weren't as they were represented.

THE COURT: I thought that's what you had said in an earlier answer.

THE WITNESS: No, that was Mr. --

THE COURT: Mandel's question.

THE WITNESS: Yes.

THE COURT: When did you first say word one to Mr. Gross about being misled?

THE WITNESS: I would say it would probably have been at the June or July times that I was in New York.

THE COURT: What did you tell him?

THE WITNESS: I don't recall. Words to the effect that "how can we be losing so much money? What is going on here?"

THE COURT: But that doesn't -- did you say to him "Charlie, you brought me in on some false information;" or something of that kind?

THE WITNESS: I don't think I did at that time, sir.

THE COURT: I'm trying to get at when you say you discussed with him that you were misled. I am looking to get what the conversation was that contained your statement that you were misled.

THE WITNESS: I don't think at that time I used the word misled. That's Mr. Mandel's word. I think at that time I was really concerned that things weren't as they were represented, but I didn't really put the two together other than we were having gigantic losses, and I thought I was in a profitable firm.

THE COURT: Mr. Kayne, let me put it to you again.

When for the first time did you say anything to Charlie Gross about him having misled you in getting you into the firm?

THE WITNESS: I really don't recall.

MR. MANDEL: I'm sorry, I didn't hear?

THE COURT: He said he really can't recall.

Did you ever say that to him?

THE WITNESS: Yes.

THE COURT: At some point you said "You brought me in on false figures. You brought me in on false statements"?

THE WITNESS: Yes, the first time I really confronted him with it on a strong basis when he handed me his resignation on August 31st in that restaurant, and I told him at that time, "How could you have misled me and brought me intc this whole situation and then you resign and get out of here ahead of me?"

That was the first time I had a confrontation with him.

THE COURT: But did you say to him that he had misled you by giving you false information to get you in?

THE WITNESS: I believe words to that effect, yes, sir.

THE COURT: In August?

THE WITNESS: Yes, in August 31st, yes, sir.

THE COURT: All right.

That's the first time?

THE WITNESS: That I can recall.

Q In your prepared remarks of August 24th --

THE COURT: This was August 31st, you say?

THE WITNESS: Yes, sir, it had been after I was in New York for three weeks and had uncovered what I uncovered.

THE COURT: August 31st.

THE WITNESS: Yes, sir.

Q In your prepared remarks of August 24th, didn't you accuse the entire executive committee -- excuse me -- you testified shortly that you learned about the restrictions in October of 1970; right?

A I said I believe I learned about them beforehand but brushed them aside, and I think in September or October aw them for the first time, what the actual restrictions id.

Q When did you first learn that there had been restrictions against the firm?

A I believe from Frank and Therese in that all-night marathon in California hotel.

Q When?

A The third week in July.

Q In July?

A 9th, of 1970.

Q You learned about the restrictions?

A Yes, sir.

Q But they had more impact on you later, is what you're saying?

A Well, one of many, many items that were being thrown at me at that time. But it was later when I actually sat down and read them.

Q I am going to read from page 21 of your prepared remarks, and that's Defendant's S.

Do you have a copy of those?

A No.

MR. MANDEL: Mr. Silfen, if you look, you would be very welcome to look over my shoulder.

(Document handed to witness.)

THE WITNESS: What page is that, sir?

MR. GRUTMAN: 21.

Q I am reading after the heading "VIII," I am going right to the paragraph;

"When Charles Sloane and I were in discussion with Gross, Settel and Bob Newburger in the fall of 1969 regarding opening of the California office for Newburger, Loeb, we were assured by these representatives of Newburger, Loeb that the firm's capital position was strong, and that they were embarking upon a sound expansion program. Charles Sloane and I took them and their representations at their word.

"In October Charles Sloane resigned his job at McDonnell Company to go to work for Newburger, Loeb, and began preparing plans for a new office.

"In January, I resigned my position with Shearson, Hammill and joined Newburger, Loeb. The executive committee must have been aware that we were going to rely on their representations, and we were going to enter our community of friends and business acquaintances and represent Newburger, Loeb as it had been represented to us, as a financially sound firm.

"It turns out, as I found out only recently, that the New York Stock Exchange Department of Member Firms was against Newburger Loeb opening a California office, and that in fact, we were on restrictions from the Department of Member Firms.

"Bob Therese told me recently that he and Charles Gross met with Mr. Bishop at the New York Stock Exchange prior to the opening of the California office, and they told Mr. Bishop and his committee that if Newburger, Loeb could not open the California office, Newburger, Loeb would be in dire straits.

"At this time I am still not aware of the basis for that representation. Thus, it is important to note at this point that not only were false representations made to us, but that a concerted effort was made to convince the New York Stock Exchange to allow Newburger, Loeb to open its facility in California. It is inconceivable to me how the executive committee expected to see any possible cash flow from California during 1970, and thus it is clear that Newburger, Loeb was only acquiring additional financial commitments and [illegible] support."

You prepared those remarks very carefully, did you not?

A I would say carefully, yes, sir.

Q And I think you testified on direct that you had them edited by lawyers to make sure there would be nothing libelous or slanderous about them, is that right?

MR. GRUTMAN: Objection; no such words were used. He simply said he edited.

THE COURT: I think he used the word "slander," as a matter of fact.

MR. GRUTMAN: No, Judge.

THE COURT: Because I remember noting it.

MR. MANDEL: I remember it.

THE COURT: I remember noting that he had the right concept but the wrong word since it was a paper.

Overruled. Go ahead.

Q Do you remember saying that?

A Yes, sir.

Q And it is true, is it not?

A Yes, sir.

Q You were that careful. And you were accusing the entire executive committee, right?

MR. GRUTMAN: Now, your Honor, I object. He is criticizing but not necessarily --

MR. MANDEL: Mr. Grutman --

MR. GRUTMAN: I rise, your Honor, and make a legal objection.

THE COURT: Overruled.

MR. GRUTMAN: "Accusation" has a special context.

THE COURT: Wait. This is cross examination at this point,and if he doesn't understand what the word accusation means, he may say so. You were accusing the executive committee, is that right?

THE WITNESS: I was making a statement that the executive committee must have been aware we were going to rely on their representations and if in effect they had passed that duty, yes, I was accusing them.

Q And that the representations were wrong, right?

A Appeared to be wrong, yes.

Q You were a little stronger than that, Mr. Kayne, wouldn't you agree with that?

A I don't think that was strong language that I prepared here, sir.

Q We will let the language and the format speak for itself.

Now, Mr. Kayne, you testified on direct that you didn't know what attorneys to consult about these problems; and that you had never consulted Mr. Persky's firm, but at least with regard to the prepared remarks, your testimony was inaccurate?

A I am confused with your question, sir.

Q All right.

A If you would break it down for me --

Q Didn't you testify on direct examination that you never consulted with any attorneys about your claims of mis repesentation until January of 1971?

A Yes, sir.

Q At least to the extent that Bamberger or Persky went over Defendant's S with you, before you read it out loud, that testimony was inaccurate, right?

MR. GRUTMAN: That is objected to, your Honor, as argumentative. Consultation with attorneys was for the purpose of starting a lawsuit.

THE COURT: No, no.

MR. GRUTMAN: The question of being accusatory or critical is not consultation for the purpose of bringing claims. There is a wide difference.

MR. SILFEN: He is mixing up apples and oranges, Mr. Mandel.

MR. GRUTMAN: Typical Mandelian question.

THE COURT: I will sustain the objection to the question the way it is put, but I suppose it is permissible to ask him what he and Mr. Persky and Mr. Bamberger discussed.

MR. GRUTMAN: That's fine, no objection to that.

THE COURT: In the preparation of these minutes.

MR. GRUTMAN: Sure.

THE COURT: To see whether it constituted consultation or not.

Sustained, go ahead.

Q Did you call Persky and tell him you wanted help with prepared remarks, or did he suggest to you that the remark be prepared?

A I don't think I called Persky. I think I called Mike Bamberger and said, "I'd like to dictate some remarks, can I use your office?" and asked him to edit it.

And I think I told him what --

Q I'm sorry --

MR. GRUTMAN: Let him finish.

THE COURT: Asked him to edit it.

MR. GRUTMAN: Told him why, I think he said.

A No, I think I told him what I wanted and that was that they were -- that I wanted to make a set of remarks to the executive committee of the firm, to both executive committees, the old and the new, and I wanted to make sure that I didn't single out anybody in that executive committee, number one.

I wanted to make sure I didn't do -- I wasn't being heavyhanded with any individual in that executive committee. I wanted to make sure that the specific language I used in protecting what rights I may have would be put in such a way that they would be clear to everybody in the room, at the same time they would serve to protect rights that I might assert later on.

And I felt that this was a partnership matter for an executive committee, and I should speak to attorneys for the partnership.

Q Now Finley, Kumble were the attorneys for the partnership, right?

A Sir, they were in my mind going to be the attorneys for the partnership the next day, on the date of that meeting. The meeting was called to also terminate Golenbock & Barell, and in fact it was done at that meeting. The next day I would say that Finley, Kumble became the attorneys for the partnership, yes, sir.

Q And you consulted them in advance because you already regarded them as for all practical purposes attorneys for the partnership?

A Well --

Q Mr. Kayne, didn't you just finish saying --

MR. SHAW: Let him answer the question.

MR. GRUTMAN: Let him answer the question.

MR. MANDEL: I will strike it.

Q Didn't you just finish saying at the end of two questions back, "I felt that I should consult the attorneys for the partnership"? Were those your exact words?

A I believe so, yes, sir.

Q All right.

And those attorneys for the partnership that you felt you should consult were Finley, Kumble, right?

A Yes, they were doing two or three --

Q All right.

A -- two or three jobs for the partnership already, and they were doing a very good job.

Q You have answered my question.

Now, when you told Mr. Bamberger, you told Mr. Bamberger that you had some claims you might want to assert against the partnership and the partners later, right?

MR. GRUTMAN: Now that, Judge, I don't believe is what the witness said.

MR. MANDEL: This is cross examination.

MR. GRUTMAN: But it is unfair, Judge, because it is not what he said.

THE COURT: If he didn't say it, he can disavow it.

THE WITNESS: I disavow it. I did not say it.

Q Didn't you just finish saying that?

A No, sir, I said I wanted to protect my rights. I did not say I had claims to assert. I didn't know what my rights were. I just wanted to go on record and spell out to everybody that I had found a bag or worms here.

Q Is that what you told Bamberger?

A That I found a bag of worms? I don't recall if I told him I found a bag or worms.

Q The question is what did you tell Bamberger about protecting your rights.

A I told him that I was going to dictate a set of remarks, and that I wanted him to edit it, and one of the things I wanted him to look for in editing it was that I had spelled out certain things, statements, with regard to protecting my rights, going forward from this day forward, and I didn't want to be commingled with the problems that had come before me. And I asked him to be clear on looking at this particular point; what happened after August 24th was different than what went before August 24th; and I wanted to know that my rights were protected. That's not necessarily rights to claims. It's rights to life and not being chased by everything that happened before me. I was concerned about going forth with this bag of worms.

Q On page 23 you stated:

"Thus it is important to note at this point that not only were false representations made to us, but that a concerted effort was made to convince the New York Stock Exchange."

You regard the accusation of false representations being made to you as light and inoffensive language in light of your testimony of what you were trying to do with this statement?

A I regard that statement as absolutely factual and I don't consider it to be loud or offensive. I just think it is an absolute factual statement and I put it in there, and knowing what I know now and how words are read, I would put it in there again.

Q You testified on direct that at this time or about this time you did not have a personal lawyer or any lawyer you knew whom you could consult and then you sort of swallowed -

that, and left it fuzzy. Am I right?

MR. GRUTMAN: Objection.

MR. SHAW: Objection.

THE COURT: Sustained.

Q All right.

Did you testify on direct that you had no lawyer at this time?

MR. GRUTMAN: No personal lawyer.

MR. MANDEL: Please, Mr. Grutman.

MR. GRUTMAN: Then I object to the form.

MR. MANDEL: Don't interrupt the cross examination.

MR. GRUTMAN: I object.

THE COURT: The objection is overruled.

A Yes, sir, I did.

Q The fact is that while this was going on, you were a plaintiff in a suit against McDonnell for false representations, right?

A That's correct.

Q And you had an attorney in that action?

A An attorney who I had -- yes, I had an attorney.

Q All right. And --

MR. GRUTMAN: Your Honor, my objection is I believe that case was in California.

MR. SILFEN: We'll get that on redirect.

THE COURT: We are just exploring facts here.

MR. GRUTMAN: But the exploration is --

THE COURT: I am not going to hear argument on this. If you have a legal objection to a question, I will hea it.

MR. GRUTMAN: My objection is the question is not asked in good faith.

THE COURT: I am unable to make that determination. I overrule it.

MR. GRUTMAN: All right.

Q Now, as a plaintiff in the McDonnell action, you became aware of the fact that there is legal liability for false representations which induce somebody to join a firm; is that correct?

A That's correct.

Q That is the same claim you were making in the McDonnell action.

MR. GRUTMAN: Objection.

Q Right?

A I don't recall the claims I made in the McDonnell action. I believe that was one of them though, sir.

Q You testified today, did you not, that when you me with Mr. Gross on January 23rd, you told him you were going to sue him? Is that what you said today?

A I believe I testified that Mr. Sloane and I met with lawyers, and that they had suggested -- and we had talked about bringing a lawsuit against Mr. Gross, and that they had suggested that we meet and talk over our differences.

Q Did you tell Mr. Gross that the lawyers asked you to try to make an amicable settlement with him of your claim for misrepresentation?

A I told him that they told us to make an amicable settlement of our grievances, right.

Q Did you make a proposal to Mr. Gross for that amicable settlement?

A Never got a chance.

Q What happened? What did you say actually to Gross, as well as you can state it, and what did he say to you?

A I testified earlier what I said.

The reason I opened the meeting and told him -- I testified that it came in two parts. I told him that the first part was that our lawyer -- we had met with our lawyers, we had told them of our grievances, they told us to try to settle it amicably, and that I told that to Gross and that I said that we had been induced into the partnership.

I told him that our lawyers had made a determination that we had been misrepresented to, and I told Gross that I wanted to talk about some kind of a settlement.

Gross said that he thought it was all wrong, that he didn't think he had any responsibility to us, and essentially dismissed the subject.

Q Did you also ask Mr. Gross to join with you in the reorganization of Newburger, Loeb?

A No, I don't think I put it that way. I asked Mr. Gross for his reasons for not going along with the reorganization.

Q You didn't try to persuade him to go along?

A No, I had been told that Mr. Gross' signature wasn't even necessary, and I wasn't there to persuade him. I was more interested in his reasons as how they affected me. Mr. Gross was a very incisive man, and he had very particular reasons, and I respected his reasons, at least listening to them.

Q And you recall testifying about this same meeting with Mr. Gross in the arbitration before the New York Stock Exchange?

A Yes, I recall testifying about the meeting.

Q I am going to read to you -- were you sworn before your testimony --

A Yes, sir.

Q In the New York Stock Exchange --

A What page is that, sir?

Q I am going to page 778 of the transcript.

MR. SHAW: Just one minute, please.

Q Do you have a copy before you, Mr. Kayne?

A Yes, sir.

MR. ESTERMAN: Page, please?

MR. MANDEL: 778.

Q Did Mr. Silverman ask you these questions:

"Q Mr. Kayne, when you came to New York in January or February '71, just before this reorganization closed, and you met Mr. Gross in the restaurant in the Wall Street area, did you tell him that you had already drafted a complaint against him, and that you had it with you, and that if he did not go along with this reorganization, you were going to sue him?

"A I think you are putting words in my mouth. I would like to describe what I did say.

"Q Will you do that, please?

"A I met with Mr. Gross in, I believe, the week before the deal closed. I think I told him at that meeting that I had met with my -- that I thought I met with my attorneys and counsel in California in early January. I had a cause of action, I was advised by my attorneys that I had a strong cause of action against Mr. Gross, and they felt in the federal court in their interpretation of stealing a partnership interest across state lines that it would be considered as a security, a federal court matter, of 10b something or other, for fraud.

"And that I was moving ahead, and I think I had even filed the action prior to my meeting with Mr. Gross, and I did not have anything with me, I do not think you carry a complaint with you, but I did -- I believe I told him I had filed the action and he would be getting served his -- in due course with that action.

"Q You filed that action before you met with Mr. Gross to plead with him to go along with the reorganization?

"A Oh, no, let's be very clear on that.

"Q Let me withdraw that question, and ask it to you this way:

"At this meeting, did you ask Mr. Gross to join with you in that reorganization?

"A Well, what I -- when I met -- what I met with Mr. Gross specifically for was to take -- there were"--

MR. GRUTMAN: Judge, the drama doesn't have to be.

THE COURT: I am listening to the words, Mr. Grutman. There is no jury here, let's go ahead.

"A There were negotiations going for the whole period of time as I testified. I had not participated in those negotiations myself, and I had never met Mr. Gross' attorney, Mr. Mandel. I had no contact with Mr. Gross practically since I -- definitely since I left New York in December 1st.

"When I met with Mr. -- what I met with Mr. Gross which was to try to point out that the attraction to me personally, Fred Kayne, as a general partner in the old entity, was that the old entity, if it went broke, I was a general partner and I was going to be liable for all of his liabilities of the partnership and that I felt my position was analogous to him as a general partner, and I tried to explain it to him that it would keep us all out of a bankruptcy position."

Now, may I interrupt your answer here, Mr. Kayne.

THE WITNESS: You don't want to go on?

MR. GRUTMAN: I object to an answer being interrupted.

THE WITNESS: There is more to be read, sir.

THE COURT: Finish the answer, Mr. Mandel.

MR. MANDEL: All right:

"He said as far as he was concerned, his counsel had interpreted his position as entirely different from mine, that he had resigned earlier than me and that therefore his money was in a safer position than mine; he had become a creditor of the corporation where I was still a general partner.

"I told him at that meeting that I did not understand that, I thought his money was still at risk. He said that is the interpretation of his counsel and his interpretation of reading the partnership agreement.

"We had a thirty-minute cup of coffee over that matter. We left no where closer to agreement than our mutual positions and our mutual positions were similar. I felt reinforced in my opinion after that, after having that cup of coffee with him in that restaurant in Wall Street. I felt reinforced in my opinion that I had done the right thing in speaking to counsel on the west coast to protect my rights and reinforced my -- and to seek damages and my money back from Mr. Gross for this, because he had demonstrated once again to me, as he had demonstrated a year previous, that he had no regard for anybody else's position, none of the other twenty some-odd general partners, and he was only interested in his personal position and his having the better position relative to a bankruptcy proceeding than I had.

"I walked out of that meeting, and that was the substance of the meeting.

"Q Having talked at length about that meeting, have you refreshed your recollection as to whether you had sued Charles Gross in California before that meeting or after that meeting?

"A I believe I filed the suit in California prior to that meeting, because I think that meeting was in the four or five days -- my meeting with Charles Gross was in the four or five days prior to the signing, and I believe I filed the lawsuit the first of February or some where in the first several days of February."

Now, Mr. Kayne, you told the arbitrators that you thought you had started the California litigation before your meeting with Gross, right?

A Yes, sir. There was a lot of confusion on that subject.

Q All right. I will take it --

A I think I should clear that up.

Q You did not tell the arbitrators that you had that meeting to try to get an amicable settlement with Gross, did you?

A No, not in this testimony, sir.

Q You did not tell the arbitrators that the meeting was divided into two parts; did you?

A I think this is two parts, definitely two parts.

Q My question is, what you told the arbitrators, Mr. Kayne.

MR. GRUTMAN: I object to the form of the question.

MR. SILFEN: That assumes they asked him that question. You are assuming the arbitrators asked him that question.

THE COURT: Maybe that is the answer to it, Mr. Silfen.

I gather you did or you did not? Obviously you did not.

THE WITNESS: Yes, sir, I did not.

THE COURT: All right.

Q Now, Mr. Kayne, didn't you tell the arbitrators in effect that you were trying to persuade Gross that your position was the same as his and if he joined in the proposed reorganization and did not try to block it, that could avoid bankruptcy for you and for him?

A No, I think my testimony reads for itself, sir. That's exactly what I told the arbitrators, what you read, and that was that Mr. Gross explained his position to me, and I didn't talk anything about a reorganization or my own.

Q All right. I am going over part of your answer on page 780.

MR. SHAW: May we have that entire answer?

MR. MANDEL: No.

THE COURT: No, you cannot.

MR. GRUTMAN: Judge, that is taking things out of context.

THE COURT: Then you can put it back in context if you like. You have had the entire answer read which is thr pages. He can certainly address his attention to one part.

MR. GRUTMAN: I thought he was going to a differen one. Fine. Is this the same or a different one?

MR. MANDEL: The same.

THE COURT: This is a portion of the long answer he already read.

MR. MANDEL: A portion of the long answer.

Q "When I met with Mr. Gross, which was to try to point out that this attraction to me personally, Fred Kayne, as a general partner in the old entity, was that the old entity if it went broke, I was a general partner, and I was going to be liable for all of his liabilities of the partnership, and I felt that my position was analogous to him as a general partner, and I tried to explain it to him that it would keep us all out of a bankruptcy position."

Now, Mr. Kayne, without fencing --

MR. GRUTMAN: Without fencing, your Honor; I object.

MR. SHAW: I object.

THE COURT: Strike that out.

Q Mr. Kayne, didn't that testimony mean that you were trying to persuade Gross to go along with the transfer agreement to avoid bankruptcy, as you put it to him, for both of you?

A Mr. Mandel --

Q Can you answer yes or no?

A No, I cannot.

Q What is your answer then, Mr. Kayne?

A Mr. Mandel, this testimony says that I tried to point out to Mr. Gross my position and then I sought out his position with regard to the partnership. With regard to my vulnerability and his vulnerability. I gave him my view and he gave me his view.

There was no talk about you do this in the reorganization, I'll do that; you sign this, I'll do that -- there was no talk about that.

This testimony is entirely in line with what happened at that meeting; and I testified in that arbitration and what I testified here today. I told him my position as a partner as what I felt was a withdrawn partner in this partnership, and I asked him his position.

Q You detested Mr. Gross by this point, right?

MR. SHAW: No, objection.

A No, I think I did not, no, sir.

Q You certainly didn't like him or admire him.

A No, I did not admire him.

Q He had just rebuffed, according to you, your efforts to make an amicable settlement of your claims of fraud, right?

A THat's correct.

Q And then you continued with the second part of the meeting, merely to get an exchange of opinions without any purpose other than that? Is that your testimony?

A Yes, sir, and when we met at twenty-four sessions of the Arbitration Association --

THE COURT: No, strike that last part out.

A Yes, sir.

Q That is your testimony?

A That is my testimony.

THE COURT: Let me see the minutes.

(Transcript handed to the Court.)

MR. MANDEL: Page 780, your Honor.

THE COURT: Mr. Kayne, let me just ask you this:

On page 780 here you are saying there were negotiations going on when you met with him, right?

THE WITNESS: Yes, sir.

THE COURT: You point out that the two of you had analogous positions.

THE WITNESS: That's what I thought.

THE COURT: You were in the same boat?

THE WTINESS: Right, withdrawn general partners, yes.

THE COURT: You were in the same boat, and something here characterizes -- "it" -- "It would keep us all out of a bankruptcy position."

What was "it" that would keep you all out of a bankruptcy position that you were talking to Charles Gross about?

THE WITNESS: That would refer to the reorganization.

THE COURT: All right.

Now, in words or in substance, were you urging upon him that he should join this reorganization to keep you all out of a bankruptcy position?

THE WITNESS: No, what I did was explain that I thought I was in an analogous position with him. Would he please then explain to me his thoughts with regard to why he didn't think that the reorganization was good for him. I thought it was good for me, as I have earlier testified; go ahead with this reorganization, and keeping the partnership from going broke.

He then said he looked at it different. As I recall from reading this before this, this court, I think he tied it in with his excess capital and that I didn't have excess capital, he felt he did have excess capital and that excess capital would be treated differently so it was more of an exploring why our positions were not analogous; and why did I assume that the reorganization was good and he didn't.

THE COURT: What did you expect to get from him in this, just a statement of his postion? How was that of value to you?

THE WITNESS: Well, very frankly, I don't know where I was going with that question. I don't know that -- I was seeking his opinion as to why he wasn't going along.

THE COURT: Go ahead, Mr. Mandel.

THE WITNESS: Sir, there was a major confusion on the dates.

THE COURT: I think your counsel will take that up.

MR. GRUTMAN: Can we hear?

THE COURT: He said there was a major confusion on the dates and I said, I think your counsel will take any steps he deems appropriate.

All right?

MR. GRUTMAN: All right.

BY MR. MANDEL:

Q Mr. Kayne, was it confusion about dates that led you to give the answer you gave to the arbitrators?

MR. SHAW: Objection, your Honor.

A No, sir, I was just confused about dates.

THE COURT: I think you better specify which answer you're talking about.

MR. MANDEL: All right.

THE COURT: Sustained.

Q Was it confusion about dates that led you to give the answers to the arbitrators about the contents of your discussion with Mr. Gross--

A No.

Q -- which I have read into the record?

A No, because part of what you said, confusion, yes. I was confused about the dates at the time of the arbitration when we had the meeting, as was Mr. Gross, because he testified in the arbitration that the meeting was held in Schrafft's Restaurant on January 15th and it has been testified in this courtroom, it was January 2nd.

So I thought it was some time in February. The testifying with regard to the dates was confusing in my answer because if the meeting -- I was not in New York on the beginni of February so I couldn't have had the meeting with Gross; I subsequently checked that on, you know, my plane tickets and whatever I had, my calendar in California, when I got back.

But if since my lawsuit was actually filed on February 3rd, if I had the meeting, I had to have that meeting with Gross before my lawsuit was filed; and that was the confusion in the testimony to the arbitrators. It would have been much clearer to the arbitrators that I had not filed my lawsuit until after I had the meeting with Gross, and so this is why I say there is confusion on dates.

Q Was it the confusion of dates that kept you from remembering, when you testified before the arbitration, that you had attempted -- you were attempting in that meeting to make an amicable settlement with Gross of a claim of fraud?

A No, the thirty-minute meeting with Mr. Gross in a restaurant was very clear to me, the content, what took place. The date it took place was unclear to me. It was unclear in my testimony at the time, and I was uncertain about it.

Mr. Gross was uncertain at the arbitration, and I think the facts are clear from his arbitration stuff that he was there the 15th. It was an unclear date in both our minds.

Q But you knew, did you not, very clearly, that you attempted to make a settlement on your attorney's advice before you began the action, right? That is clear from your testimony here today, is it not?

A Yes, sir.

Q But when you spoke to the arbitrators, you said

"I think I had even filed the action prior to my meeting with Mr. Gross."

Is that correct?

A Yes, sir.

THE COURT: Mr. Kayne, if you filed the action prior to the meeting with Mr. Gross, what was the purpose in your meeting?

MR. GRUTMAN: Your Honor, I object to your question.

THE COURT: I am taking his state of mind as he testified at the arbitration.

MR. GRUTMAN: I see.

THE COURT: At that point he recalled that he had already filed it, and I am trying to ask what did he have in mind as he testified at that time.

MR. GRUTMAN: I must object to that, Judge, on the following basis:

At the time that he testified there was obvious error, because he says that the date he ascribed could not have been a time when he was in New York, that the actual date of the conversation must have been some time before the suit was filed. That has been established in this case before you as February the 3rd. He was not in New York at the beginning of February, so the meeting took place some time before the beginning of February; which date we are now told, is January 23rd; so to ask him what would have been in his mind on January 23rd about a lawsuit that hadn't yet been filed is an interesting question, but I think an unfair question.

THE COURT: But in relating what he was meeting with Charlie Gross for, to the arbitrators, he was saying he was there to get Mr. Gross' position vis-a-vis the proposed reorganization, and really nothing more.

THE WITNESS: No.

THE COURT: Because the action had already been started.

MR. GRUTMAN: But that's the error, Judge.

THE COURT: But this is what that testimony amounts to.

MR. GRUTMAN: Well --

THE COURT: I am just trying to ascertain from this what -- I am trying to assess the overall state of mind of Mr. Kayne during this period of time, and I am trying to see where this little piece of evidence fits, if at all.

MR GRUTMAN: Does your Honor also recall that this witness has said here and in the arbitration that whenever that meeting took place, on whatever date, whether before or after the suit had been commenced, he did not think Charlie Gross' consent to the reorganization was a necessary element for the transfer agreement to go forward?

THE COURT: I understand that. All right.

MR. GRUTMAN: Would you answer his Honor's question Mr. Kayne?

THE WITNESS: What was the question? I'm sorry.

COURT: Forget it. I withdraw it.

BY MR. MANDEL:

Q Mr. Kayne, you said he invested $50,000 in the partnership, right?

A Yes, sir.

Q How much money did you and Mr. Sloane ask as damages from Mr. Gross in the California litigation?

A $3,100,000.

Q Is that how much you lost as a result of Mr. Gross' alleged fraud?

A No.

Q Do you recall that in fact originally Mr. Gross or somebody proposed that you have only a one point interest in the partnership, and you wanted two points; is that correct?

A Yes, sir, I wanted to be equal to Mr. Sloane.

Q So that at least they weren't trying to get 50,000 from you, they were only trying to get 25,000, but you wanted a $50,000 investment; is that right?

A I wanted two points. I thought Charles Gross was going to arrange the loan of the money for me. I wanted two points. I wanted to be equal with Mr. Gross. I wanted two points --

MR. GRUTMAN: Mr. Sloane.

A Mr. Sloane.

Q You say Gross was going to arrange the loan for you?

A Yes, sir.

Q And that is why you wanted two points?

A No, I wanted two points because I wanted to make the profits of the two points.

Q Now I show you a piece of paper and ask you if you know what it is.

A Yes, sir, I know what it is.

MR. SILFEN: Can I see it?

Q Is that your signature on it?

A Yes, sir.

Q And does this --

MR. MANDEL: I offer it in evidence. Let's mark it for identification.

(Defendant Gross' Exhibit LLLLB marked for identification.)

MR. SILFEN: I would object your Honor on the ground that I don't understand the relevance of the document.

MR. MANDEL: The witness has testified that he wanted to buy it because Gross was going to get him a loan. That's why he wanted to buy it and here is a statement to the New York Stock Exchange saying he is not going to borrow any money to get his two points, he is worth $300,000.

THE WITNESS: That is not what the statement says.

MR. SILFEN: Whatever the statements says, it says.

I would object on the ground of relevance and on the offer of proof Mr. Mandel is making, it does not support that proof.

MR. MANDEL: My friends tell me paragraphs 1 and 6, your Honor --

(Document handed to the Court.)

THE COURT: I will overrule the objection.

(Defendant Gross' Exhibit LLLLB, was received in evidence.)

Q Was your net worth at that time in excess of $300,000, Mr. Kayne?

A I don't recall. It has changed so many times.

Q All right.

Now, Mr. Kayne --

THE WITNESS: He made a mistake, Judge. Should that be cleared up?

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THE COURT: Not now.

THE WITNESS: I'm sorry.

Q Mr. Kayne, I call your attention to Exhibit LLLX, which is your letter of December 30th to Mr. Risher, concerning certain warrants.

You never produced that in connection with your deposition, did you?

MR. GRUTMAN: Objection.

THE COURT: Overruled.

A No, sir, I did not.

Q Will you tell me why you failed to produce that exhibit on your deposition?

A Best I can ascertain is that I didn't have a copy of it. It is a -- I wrote the letter in December of 1970. I left the employ of Newburger, Loeb in -- as an officer, in 1972, February '72, and in February of -- excuse me, in the fall of 1972 I left the firm entirely. And it was a piece of correspondence between two people that appeared unimportant to me and as best as I can ascertain, at the time of my deposition, a significant time later, I didn't have the letter.

Q You knew you were a party in the litigation, did you not? When were you served in this litigation?

A I do not recall. I knew I was a party. I do not know at what point I knew I was a party. I certainly knew I was a party.

Q And you knew you were a party before you sold out your position in Newburger, Loeb in 1972, did you not?

A Well, I knew I was a party -- let's see -- February of 1972?

Q Yes.

A I can't recall what I knew then. If it is a fact, I knew it. If it is not, I do not recall it. But I knew the corporation was -- I had an -- had undertaken my defense and the -- I was not paying the legal bills and I was indemnified by the corporation for any acts I did as a corporate person, and I figured all the records and everything were held at the firm. I didn't have any records. I brought you everything I had in my files and you subpoenaed or asked me to do that.

Q It never occurred to you that any records you might have could be relevant to the prosecution or defense of this litigation?

MR. SILFEN: That is not what he just said, Judge.

MR. GRUTMAN: Objection.

THE COURT: Yes, sustained.

Mr. Mandel, I don't see how that follows from anything you have asked before.

MR. MANDEL: Pardon?

THE COURT: I don't see how that follows from anything that you have asked before.

MR. MANDEL: He said he threw out the records.

MR. GRUTMAN: He did not say that.

MR. SILFEN: He did not say that.

Q What happened? What do you say happened to your copy --

THE COURT: What happened to your copy?

Q -- of LLLX?

THE COURT: Let's go to that directly.

THE WITNESS: I don't know what happened to my copy. I think I threw it away at the time I left the firm.

MR. MANDEL: That is what I understood him to say.

THE WITNESS: I would guess that's what happened to my copy.

Q And I am saying it did not occur to you that your records might be relevant to the defense or prosecution of this important action?

A No.

Q Did you say you never consulted anybody about whether you should sue Mr. Gross?

MR. GRUTMAN: May we have a time?

Q At any time.

A No, I didn't say that.

Q Whom did you consult about whether you should sue Mr. Gross other than your California lawyers?

A I cannot recall consulting anyone else.

Q Anyone?

A Yes.

Q Going to your deposition, page 201:

"Q Have you completed your answer to the question that was just read?

"A Which question are you talking about?

"MR.ROTHMAN: To the first of the two questions, namely, each and every person to whom you discussed the possibility of bringing a lawsuit or ground for bringing a lawsuit against Charles Gross."

And I am skipping colloquy:

"Q The names and the approximate time.

"A Okay.

"With Ned Frank and Bob Therese.

"Q The time for Frank?

"A In the meeting that we had at the Century Plaza Hotel in mid-July; and Chuck Sloane. Bob I believe on several occasions in the month of August 1970."

MR. GRUTMAN: That is Bob Therese, isn't it?

MR. MANDEL: Yes.

"Q And either Robert Persky or Michael Bamberger, around August 23, 1970 I believe the prepared remarks that I read to the executive committee included some wording to the effect that I reserved my rights and legal remedies that might be open to me, so I actually talked to everybody who was present at that executive committee on August 24th."

Now, do you recall giving those answers to those questions?

A Yes, sir.

Q Does that refresh your recollection that on August 23rd and August 24th, 1970, you conferred with Persky or Bamberger by bringing action against Gross?

MR. SHAW: Objection, your Honor.

THE COURT: What is the basis?

MR. SHAW: It is misleading.

THE COURT: It is a question of whether it refreshes his recollection. Either it does or it does not.

Overruled.

A Sir, your earlier question to me was did I consult an attorney about bringing a lawsuit.

MR. SHAW: Or grounds.

MR. GRUTMAN: Or grounds, was the question.

A And I am talking about the question before that, which was before -- before you read the deposition testimony. I did not consult an attorney to bring a lawsuit.

This case discussed the possibility of bringing a lawsuit, ground for bringing a lawsuit against Charles Gross. As far as I was concerned here, my answers afterwards had to do with Ned Frank and Bob Therese. They both discussed the possibilities with me of having lawsuits; both in that Century Plaza meeting and afterwards, many times.

With Persky or Bamberger, I particularly talked to them,to Bamberger, about I didn't want to be vituperative or heavy-handed with anybody,and I wanted to protect my rights, and Charles Gross' name came up in that discussion, "How about Charles Gross?" and I said, "Everybody."

That's not the possibility of bringing a lawsuit. It was a discussion with them insofar as not singling out Mr. Gross.

Q Are you saying that your answer on page 220, lines 19 to 20 -- page 230, line 4, does not contain a statement that in context that you discussed on August 23rd and August 24th with Persky or Bamberger the possibility of bringing a lawsuit against Gross or grounds for bringing a lawsuit against Charles Gross?

MR. GRUTMAN: Your Honor, I object to that question as repetitious. We have had --

THE COURT: No, overruled. Overruled.

A I am not trying to be fencing, Mr. Mandel. I don't see that in the context of lines 19 to 25.

THE COURT: Start at the top of the page, Mr. Kayne, and read down to there in the context of the question that you were asked, both by -- frankly, by Mr. Rothman in both cases.

A The question was asked in the context up above of the possibility of bringing a lawsuit or grounds for bringing a lawsuit and with Ned or Therese.

THE COURT: Against Charlie Gross.

THE WITNESS: Against Charlie Gross with Ned or Therese. The context was at that hotel and many times afterwards, and it was a discussion that I -- they brought up. The discussion or my reference to Persky or Bamberger was in, you know, I recollect I worked on this deal, this prepared remarks, with Bamberger, around the 24th. It was strictly as I have testified here, what I meant to say at that time during my deposition, what I am saying here, is that I talked with them and specifically said I did not want to single out Gross, I did not want to bring -- I was not bringing a lawsuit at that time against Mr. Gross.

I did not discuss a lawsuit. I wanted my remarks to reflect that; and that's the only -- August 23rd is a Sunday, August 24th was the day of my prepared remarks. I met with Mr. Bamberger on those prepared remarks at that time.

Q Didn't Mr. Bamberger ask you something about what is the basis for your idea that you have a claim against Gross?

A I didn't say I had a claim against Gross. Mr. Bamberger never asked me that.

Q Did you tell Mr. Bamberger that you wanted to make sure you weren't making any accusations against Gross?

A I think that I said that I didn't want to make any accusations against anybody in the room. I wanted a statement to go on the record reciting the facts as I had found them and I wanted to represent them, and I wanted everybody in the room to be free of any names being used in that 32-page document; and I tried not to be accusatory of anybody.

Q Did you mention the name Gross in your conversation with Bamberger?

A I don't recall. If I did, it was only to his exclusion.

Q Did you mention Gross in an exclusionary way?

A I don't recall, sir.

Q I point your attention to page 203, lines 5 through 9, and continuing with where we left off now:

I said, "How about the partners," and you answered, "I don't recall at that meeting whether I made any statements to anyone or at the meeting any statements with regard to suing Gross, of suing anybody else, I don't recall."

Did you give that answer?

A Yes, sir.

Q And is your present recollection the same, that you don't know whether you spoke at that meeting to anybody about suing Gross?

A My recollection is really clearer today that I did not. I heard Mr. Gross testify to that.

Q Clearer today than when you testified?

A Yes, I heard Mr. Gross testify to that the other day, sir.

Q Now, you were questioned yesterday about Exhibit LLLP in evidence and particularly, which is Stern's notes of September 3, 1970, and particularly about the afterward meeting referred to in those notes between Stern -- which Stern is that, Richard?

A Yes, sir.

Q And yourself, and Frank and Persky. Do you recall that testimony yesterday?

A Yes, sir.

Q Are you familiar with Exhibit LLLQ, which was produced by Mr. Stern simultaneously?

MR. GRUTMAN: Is that the list of grievances?

MR. MANDEL: That's right.

MR. SILFEN: Simultaneous with what?

MR. MANDEL: With LLLP.

They were both produced together, and I am showing it to him.

MR. SILFEN: I want to make sure Mr. Kayne understands what you meant by the word "simultaneously."

Q Do you understand?

A No.

MR. GRUTMAN: They were delivered at the deposition.

Q At the deposition of Stern he brought the big notes and the little notes out together.

A Yes.

MR. SHAW: Didn't you say that the little notes dropped out of the big notes?

MR. MANDEL: I don't recall that, Mr. Shaw.

MR. SHAW: That is my recollection.

MR. MANDEL: If you wish to go back -- if you make a representation, I will take it.

THE COURT: We do not need that.

MR. MANDEL: All right.

THE COURT: Mr. Mandel, what is your question based on this exhibit?

MR. MANDEL: Whether it refreshes his recollection as to a conversation, and if he can identify the grievances and threats.

Your Honor has not seen this exhibit?

THE COURT: I have not seen it.

A I have no idea what this is about. It does not refresh my recollection.

(Documents handed to the Court.)

MR. SILFEN: Your Honor, could I approach the bench with Mr. Mandel for one second, Judge?

(Discussion off the record.)

Q Have you noticed on Exhibit LLLQ that there is a list of grievances and a list of threats?

THE COURT: Better put it under his eyes.

MR. MANDEL: Do we have any other copies of this?

(Documents handed to the witness.)

A Yes, sir.

MR. SHAW: I object to the question: "List of threats."

MR. GRUTMAN: Does it say "threats" there?

MR. MANDEL: Yes, it says "threats."

Q Under "Threats," do you notice the first thing said is "Not sell, team bankruptcy"? Does that have any meaning to you?

A No.

Q The next thing under "Threats" is "Pull out."

Does that have any meaning to you?

A No.

Q The next under "Threats" is "Expose lies to authorities."

Does that have any meaning to you?

A No.

Q Did you at any time ever say to anybody that under certain circumstances you would expose to the authorities any lies made by Charles Gross?

A No.

Q Do you notice under the list of grievances the first thing that says "Improper business procedures."

Does that have any meaning to you or ring any bells with you?

A That's a fairly common term. I --

Q Did you ever express that as a grievance against anybody?

A I think in my statement -- no, not those words, no.

Q In general?

A In my 32-page statement I said that there is lack of financial controls. I guess that could be construed to be improper business procedures.

Q The next is failure to terminate New York Plaza lease, failure to terminate 24-floor lease. Does that have any meaning to you?

A The firm certainly failed to do that, the partnership.

Q You don't associate any of these grievances or threats with Charles Gross, is that what you are saying to me?

A No, I did not say that.

Q Do you associate them with Charles Gross?

A It is hard to disassociate him of them when he was managing partner. He was a member of the executive committee, and to the extent he participated or dominated it or whatever terms are used, I think he was probably instrumental in some of those things not being done.

Q All right.

There is this grievance, "Ball team, bad concept, failure to sell properly or at all."

Did you ever voice that as a grievance against Gross?

A Against Gross?

Q Yes.

A I think I voiced to Gross and to others that it was a bad concept.

Q All right. The next is "Lies to New York Stock

Exchange, failure to notify of debt."

Did you ever voice that grievance against Gross?

A Not against Gross. In my 32-page statement I said that the whole group of people did not notify the Exchange, including Gross. I think somebody else has to interpret whether he as managing partner was responsible for notifying the Exchange.

Q How about "Lies to Sloane and Kayne"?

Did you ever voice that as a grievance against Gross?

A At which period of my life?

Q All right. How about "Hook up with swindler, without contract."

Did you ever voice that as a grievance against Gross?

A No.

Q Next is "Searles." Did you ever voice anything about Searles as a grievance against Gross?

A I think I did voice that it was a bad concept.

Q And it was Gross' fault?

A It was a bad concept.

Q But was it Gross' concept?

A Yes.

Q Was it his fault?

A It was Gross' concept.

Q Did you tell that to people?

A No, they told it to me. I met Mr. Searles while he was going out and I was coming in. They introduced me to him and he came to my office and demanded money, and it was a bad concept.

Q "Misrepresentation of committed capital, (fraud)."

Did you ever voice that as a grievance against Gross?

A Later in my lawsuit I did.

Q "Failure to insure claim of $150,000."

Did you ever voice that as a grievance against Gross?

A No, I did not.

Q "Trading or arbitraging accounts."

Did you ever voice that as a grievance against Gross?

A Specifically against Gross, no.

MR. MANDEL: Maybe we should stop now for today?

THE COURT: All right, we will recess until 10 o'clock Monday morning.

MR. GRUTMAN: Can we have some indication from Mr. Mandel how long he expects to keep Mr. Kayne?

MR. MANDEL: Less than an hour.

pgjt 1

NEWBURGER, LOEB & COMPANY, INC., as assignee of claims of David Buckley ans Mary Buckley,

Plaintiffs,

vs. 71 Civ. 635

CHARLES GROSS, MABEL BLEICH and GROSS & COMPANY,

Defendants,

- and -

NEWBURGER, LOEB & COMPANY, a New York Limited Partnership, ANDREW M.. NEWBURGER, ROBERT L. NEWBURGER, LEO STERN, ROBERT L. STERN, RICHARD D. STERN, JOHN F. SETTEL, HAROLD J. RICHARDS, SANFORD ROGGENBURG, ADOLPHUS ROGGENBURG, NED D. FRANK, ALEX AIXALA, FRED KAYNE, ROBERT MUH, PAUL RISHER, CHARLES SLOANE, ROBERT S. PERSKY, FINLEY, KUMBLE, UNDERBERG, PERSKY & ROTH, a Partnership and LAWRENCE J. BERKOWITZ,

Additional Defendants on Counterclaims.

Continued Cross Examination of Fred Kayne.
July 28, 1976

BY MR. MANDEK:

Q I believe last week you testified that you never consulted an attorney about your misrepresentation case against Gross in January of 1971; is that correct?

A That's correct.

Q You testified that at that time you consulted Mr. Massing; is that correct?

A That's correct.

Q That was the first time you discussed this matter with Mr. Massing?

A Yes, sir.

Q First, Massing is a personal, a social friend of yours, at that time?

A He was just becoming one.

Q He was a personal and social friend of yours in March and April of 1970, was he not?

A I don't recall if I met him at that time. No, sir.

Q I think you also testified that you and Mr. Sloane spoke to each other about March or April of 1970 when you learned some certain facts, and you were concerned at that time that you had been lured into the firm by misrepresentation; is that right?

A I think I testified last week that in April or

May, I believe it was early April, that we discovered for the first time that there had been significant losses in the firm the month of March, and after that some time between that meeting and our visits, back to New York for the executive committee, Mr. Sloane and I discussed the financial conditions of the firm, yes.

Q You were very concerned at that time about your exposure and the fact that you had been brought into the firm by false pretenses, right?

A I think I was very concerned about my exposure in the firm at that time, and it grew as the months went by, yes, sir.

Q Would it refresh your recollection with regard to your first discussion with Massing if I were to read to you from Sloane's deposition in which he says that there was a discussion with Massing in April or May of 1970.

MR. SHAW: Objection. We have had rulings on this type of attempt to impeach or contradict the witness.

THE COURT: I won't let you read it to him, but I will let you show it to him.

Q I ask you to look at pages 31 through 34 of Mr. Sloane's deposition and see if anything there refreshes your recollection.

MR. MANDEL: There are two sessions with respect to the Sloane deposition. There is one in January and one in February. Evidently because there were two different reporters each begins with page 1.

I am now showing the witness Mr. Sloane's January deposition, the first session.

MR. SHAW: January 28th.

A What was your question?

THE COURT: Whether that refreshes your recollection that you met with Mr. Massing in May of 1970.

A No, sir, it does not refresh my recollection.

Q Do you remember having any conversations with Mr. Sloane?

MR. BIEHL: Just to correct the record, I do not believe that there is any basis in pages 30 and 31 for anything to be implied in the record for what Mr. Mandel has just said.

THE COURT: Pages 33 and 34.

MR. SILFEN: In all fairness, I think Mr. Mandel should extend the area of Mr. Kayne's direction through page 37 in order to get a complete picture of what this line of questioning is all about, because it does not end in the context of the question on page 34. It goes on beyond.

THE COURT: All he is asking is whether or not there is a meeting. If there is something that needs to be elaborated on, you may do that.

Q Did you have any discussions with Mr. Sloane in April or May of 1970 about a conversation he might have had with Massing?

A I don't believe so. I don't recall.

Q You were in close touch with Sloane during that period, were you not?

A Yes, sir.

Q You spoke with him almost every day, if not many times a day, right?

A Yes, sir.

Q You were both very concerned about what you were finding out about your situation at Newburger Loeb; is that correct?

A I would say that's a correc statement.

Q Your joint interest with Sloane continued all the way up through the inception of the litigation, and then the arbitration, and the conclusion of the arbitration, right?

MR. SHAW: Objection. "Joint interests"?

THE COURT: Go ahead.

Q Is that correct?

A Yes.

Q Each of you paid half the cost of the litigation of the arbitration?

A Yes, sir.

Q Each of you demanded the same remedy?

A Yes, sir.

Q You worked in complete cooperation and disclosure with each other at all times, you and Sloane?

A That's taking your supposition that he told me about the meeting he had in April with Mr. Massing, which he didn't. We worked in full cooperation all the way through. I had no knowledge of such a meeting until reading this stuff.

Q Do you remember testifying in the deposition that you discovered you were defrauded 30 or 45 days after you became the managing partner?

A I never used the word "defrauded" in my deposition, that I can recall.

MR. MANDEL: 40-11 through 40-24.

MR. SILFEN: Page 40, line 11.

Q I ask you to look at your deposition, page 40, line 11, and answer whether I asked you the following questions and whether you gave the following answers:

"Question. Do you now say that you were defrauded at any time?

"Answer. Yes.

"Question. When do you now say you discovered you were defrauded?

"Just so my question is perfectly clear, I don't mean defrauded in general, but defrauded by misrepresentations which had been made to you before you became a partner in Newburger Loeb.

"Misrepresentations owing to the financial condition and business of Newburger Loeb & Company.

"Answer. I believe it was in the period within the first 30 or 45 days after I came back to New York as managing partner."

Did I ask those questions and did you give those answers?

A Yes, sir.

Q Do you recall that you also testified in the deposition that beginning in September you realized the full magnitude of the misrepresentations? Do you recall that?

A Do I recall that from my testifying last week or testifying in my deposition?

Q In your deposition.

A No, I don't recall that specifically.

Q You spoke about your meeting with Mr. Gross and Mr. Golenbock on direct examination, Mr. Kayne; is that correct?

A Yes, sir.

Q During that meeting, did you threaten to bring litigation against Mr. Gross or did you threaten to sue Mr. Gross for the alleged misrepresentations he had made to you? I think you said no on direct examination. Is that correct that you did not make such a threat?

A I don't recall.

Q Did you make such a threat during the meeting with Mr. Golenbock and Mr. Gross?

A I got very upset with Mr. Gross and I was very angry at that meeting. I don't recall exactly what I said to him with regard to any litigation or anything that I might -- any claims that I might have against him.

Q I call your attention to your answers on the deposition, page 197, lines 14 to 198, line 2. Did I ask you these questions and did you give these answers?

"Question. During the course of that meeting with Mr. Gross and Mr. Golenbock, did you threaten to sue Mr. Gross for any reason?

"Answer. I don't specifically recall. I think it was around that time, either in the time frame of sequence of events in September that I first said to

Charlie Gross -- and it might have been at the Golenbock meeting with Golenbock's attorney -- I think 'you have done me a substantial harm. I think you have really misrepresented to me and I think I have legal rights in the whole thing, and I think I am going to pursue them,' or words to that effect."

Does that refresh your recollection as to what happened at the meeting with Golenbock?

A That's entirely within the framework of what I might have said to him. Yes, sir.

Q So if you answered on direct you made no threats to sue Gross at that meeting, your answer was mistaken?

MR. SILFEN: I object to the form of the question. There is no correlation between the two of them. A threat to sue, an affirmative statement saying that "I may pursue legal rights," is not necessarily the use of the words as a threat.

THE COURT: The record speaks for what it says.

Q I think you said on direct examination you felt you were euchred by Mr. Gross to put $50,000 into this partnership during the first part of 1970; is that correct?

A Yes, sir.

Q You are aware, are you not, of the amount of money Mr. Gross put into the Newburger Loeb partnership during the first half of 1970?

A Not completely aware of it, but I know it was substantial.

Q You know that during that period that Mr. Gross put in over $300,000 -- actually about $380,000 -- of capital he was not required to put into the firm; is that correct?

A I'm not aware of the exact amount, sir.

Q What is the extent of your awareness?

A I know it was more than the $50,000 I put in.

Q At the time you knew Gross had put in capital?

A No, sir. I did not know until the arbitration. I did not know until the arbitration testimony that Mr. Gross had put in that amount of money some several years later.

Q When you were managing partner you were very concerned about the capital position of the various partners; is that not right?

A Yes, sir.

Q I think you told us on direct examination that you tried very hard to get the deficit partners to put in their deficit and I think you said -- my guess is over eight times -- that you were always frustrated by them; is that correct?

A Very correct.

Q While you were managing partner and pursuing the question of partnership capital, you were aware of Mr. Gross' capital position, were you not?

A Approximately, sir.

Q You knew that he had substantial -- what you call - "good capital"; is that right?

A Yes.

Q And that the reason he had substantial good capital is that he had put in substantial capital in excess of the committed capital. Do you know what I mean when I say "committed capital"?

A Yes, sir.

Q You knew also that a partner's right to withdraw committed capital under the partnership agreement was quite different from his right to withdraw excess or additional capital?

MR. SHAW: Objection.

THE COURT: This goes to a different point. Overruled.

A I knew there was a difference between the two, yes, sir. I was not sure of exactly what the differences were, but I knew there was a difference.

Q And the right of withdrawal?

A Yes, sir, I believe so.

Q During December of 1970 and January of 1971, you were informed by Mr. Shaw that Gross, Bleich and Donahue were opposed to the proposed transfer agreement, right?

A No, sir. Your dates are wrong.

In December, I believe, Bleich and Donahue went along. I was told all along they were all in favor of it, and the only one that was not in favor of it was Gross, and I don't know when I knew about Gross being not in favor of it. I think that it was some time in January.

Q I call your attention to page 277 of your deposition, lines 11 to 25. Did I ask you these questions and did you give these answers?

"Question. Were you informed by anybody during December of 1970 and January of 1971 of dangers to the consummation of the transfer agreement arising from the position taken by Gross, Bleich and Donahue?

"Answer. I was informed that Gross, Bleich -- I was informed that Gross, either himself through his attorney, had stated that he did not want to since the agreement --and I think later in that period and probably February I found out that his sister and former associate of Bleich and Donahue also did not want to sign.

"Question. And how did you get this information?

"Answer. I think through Bob Muh. That's the best I can recall."

Did you give those answers?

A Yes, sir.

Q Were those answers accurate answers?

A Yes, sir.

Q Do you recall receiving a telephone call from Persky or Risher or Muh on or about January 15, 1971 relating to a meeting they had just had with Mr. Gross and Mr. Mandel?

A I testified last week that although I was unclear of the date I recall getting such a call from Bob Persky.

Q What did he say to you?

A In substance, he said they had just come from a meeting where he and Bob Muh and Paul Risher had attended with Mr. Gross and his attorney, Mr. Philip Mandel, in an effort to talk with Mr. Gross with regard to his going along with the transfer agreement. He told me in substance that Mr. Gross declined to go along, wanted his money, and felt that the -- It was in the best interest to not go along with the agreement or to take any paper, but he would prefer to see that the partnership liquidate.

He further told me at that meeting -- I think this was the first time I heard of it -- that Bleich and Donahue probably wouldn't go along with the final transfer agreement. I recall my question to him was that they in substance had gone along with that marathon closing on December 30th or 31st, and that in his opinion did that jeopardize the transfer agreement?

In substance, I believe he told me that as long as the other limited partners went along with Bleich and Donahue not going along, that he felt that the agreement could go through, and that was essentially the end of the conversation.

Q Was Mr. Sloane with you when you received this telephone call?

A Not that I can recall.

Q Did Mr. Persky say anything to you, or did you say anything to Mr. Persky, about claims against Mr. Gross?

A No, sir.

Q Did Mr. Persky do anything to persuade Mr. Gross to go along and cause Bleich and Donahue to go along?

A No, sir.

Q Mr. Persky was just calling you to give you a bulletin?

MR. SHAW: Objection.

THE COURT: What's the matter with that?

MR. SHAW: It is argumentative. It is sarcastic.

THE COURT: He is just describing to you what happened.

Is that right?

THE WITNESS: Yes, sir.

Q Did Mr. Persky indicate to you that Bleich and Donahue would have to be paid out if they didn't go along with the deal?

A He didn't indicate in substance that I recall anything more than I just described here today.

Q You don't recall any conversation between you and Sloane after that telephone call you got from Persky?

A I recall a conversation I had with Sloane.

Q All right. When did that conversation take place?

A Shortly thereafter, I spoke with Mr. Sloane and told him the substance of that conversation.

Q Within minutes?

A I don't recall.

Q You understood from Persky's conversation with you that the refusal of Bleich and Donahue to go along might jeopardize the deal because other limited partners might not go along without them; is that correct?

A Persky did respond that to my question he felt that if Bleich and Donahue -- he was not sure they were not going along. Apparently, he was not sure that Gross spoke for them. He felt they might have had their own attorneys and their own attorneys might have seen things in a different interest than Gross did. I don't think at that point he was sure of that at all, but I have given you the substance of the meeting.

3 Q Did you get the impression from the meeting with Persky that Gross and Bleich and Donahue might be jeopardizing the success of the proposed transfer agreement?

A Not really, no.

Q Did you say anything to Sloane that indicated that Gross and Bleich and Donahue were jeopardizing the success of the proposed transfer agreement?

A No. I pretty much transmitted the substance of Persky's views and in the short time we discussed it Sloane and I, as I can best recall, that brought up the possibility that it could be jeopardized or something else would have to be done between the closing and that meeting, whenever it took place.

Q Sloane brought up the possibility?

A I don't remember.

Q Did he become agitated?

A No, sir.

Q Did Mr. Sloane make a telephone call in your presence to Gross?

A No.

Q Did Mr. Sloane ever tell you he had called Gross at Mr. Mandel's office on January 15 within minutes after the conclusion of your discussion with Persky?

A Yes. He told me of such a phone call, but he didn't -- I don't know about minutes.

Q When did Mr. Sloane tell you about that phone call?

A Later on the same day.

Q What did he tell you about the phone call?

A He told me he spoke to Gross and he told him that he had asked him to go along with the transfer agreement.

Q Anything else?

A He said Gross didn't want it.

Q Did he tell you that he had used some arguments to try to persuade Mr. Gross?

A He told me he pleaded with him.

Q Did he tell you why he pleaded with him? Or what he said?

A No, not that I can recall.

Q I think you said on direct examination on Friday --

MR. SILFEN: Thursday.

Q -- on Thursday that when you met with Mr. Gross at Schrafft's on January 23rd you told him that you did not know how by resigning as a partner he could -- I think your words were -- leapfrog ahead of the limited partners. Did you make that statement?

A Words of that substance, yes.

Q Is that still your view or do you have a different view today?

A I have the same view.

Q Are you aware that your attorneys have brought a motion in this case that is now pending claiming that because you resigned before Bleich and Donahue resigned as limited partners you are not liable for repayment for all or any part of the limited partners' capital?

MR. SHAW: Objection. I do not think that correctly sets forth the substance of the motion.

THE COURT: This is something for somebody else to argue.

MR. SHAW: I would like to note an objection.

MR. SILFEN: Whatever the motion said, that was the motion. That's not an accurate recitation of what the motion was addressed to. It had different parts to it.

THE COURT: If he takes a legal position here, I don't know how that is relevant to the issues that existed in the winter of 1970 and 1971, unless there is some way that you can get back to that by conversations or otherwise.

MR. MANDEL: If he says he doesn't know what his attorney said, that's the --

MR. SILFEN: I don't think he said that. If you want to go through what the entire motion was and then ask him based upon what our motion was if he was aware of that motion, that's more accurate.

THE COURT: Ask him if he knows there was a motion pending and what was in it.

Q Do you know there is a motion pending brought by your attorneys on your behalf?

A Yes, sir.

Q With regard to your liability on a contractual basis vis-a-vis Bleich and Donahue?

A Yes, sir. I know there is such a motion.

Q Do you know that it is contended in that motion that you have no liability as a former general partner to repay?

MR. GRUTMAN: That's not correct.

THE COURT: See what the answer is.

Q You have no liability as a former partner to repay the capital balances of Bleich and Donahue as limited partners.

MR. SILFEN: I object to that. That's not what the motion is.

I will let him answer.

A I am getting confused.

(Record read.)

THE COURT: Do you know that as a fact?

THE WITNESS: I would say that I believe that's in essence the motion.

Q You now say you had a different view about that liability on January 23, 1971, when you met with

Mr. Gross?

MR. SHAW: Objection, your Honor.

THE COURT: Overruled.

A I don't know what my thought was. I think the two things are very different, as I sit here now. I don't know what my thought was then. I didn't see how Gross as a general partner, could get his money out before a limited partner, and I don't see where I got any of my money out before any of the other limited partners. I don't see where that has happened today.

Q You didn't have any money to get out. You were in a deficit.

MR. SHAW: Objection. This is all argument.

MR. MANDEL: He knows whether he had money to get out or not.

A As of the numbers that I had on January 23, which were the unaudited numbers, I was still in a positive position. It was only when the Peat, Marwick audit was done that I found out I was entirely wiped out.

Q You attended the closing on February 11th; is that correct?

A Yes, sir.

Q Am I right that you testified that you were entirely unaware of the problem raised by Mr. Bracker?

A Yes, sir.

Q You heard nothing about it, nothing about it, and never became aware of it until a later date?

A It is to the best of my recollection, yes, sir.

Q When did you learn for the first time that Bracker had refused to give an opinion on behalf of the partnership saying that the proposed trasfer agreement was validly authorized without the signatures of Bleich and Donahue and so forth?

A I don't recall.

Q You were aware, were you not, on February 11th, that the corporation assumed all liabilities owed by the partnership to Gross, Bleich and Donahue?

MR. SHAW: He asked that question before and answered it.

THE COURT: I think you are going on to something else. If he answered it the answer is yes.

MR. SHAW: He answered it negative.

THE COURT: This specific one, was that included --

MR. MANDEL: Mr. Shaw, I think you are wrong. I think he was talking about December 30th, and I am now talking about February 11th. This is cross examination.

THE COURT: Let's go forward.

Q Do you have the question?

THE COURT: Were you aware the corporation assumed such liabilities as existed to Gross, Bleich and Donahue?

THE WITNESS: Yes.

Q On February 11th, when you attended the closing, you signed the transfer agreement in several capacities; is that correct?

A No. I believe I only signed it in the capacity of an officer of the corporation, and also my employment agreement, I signed --

Q Did you also sign a consent and an approval as a former partner?

A I may have. If I did I did.

Q It's on the record.

You know on February 11th that Bleich and Donahue had capital balances of $75,000 each as limited partners; is that correct?

A Well, I didn't know exactly what the capital balances were, but, in substance, I would say that's correct to the best of my recollection.

Q You knew that Gross had a capital balance too?

A Yes, I would say so.

Q Was it in your mind on February 11th that the corporation was going to pay the sums of money owed to Gross and Bleich and Donahue?

MR. SHAW: Objection. That should not be binding on the corporation what his intention was. The agreement speaks for itself.

MR. MANDEL: It is certainly binding on him.

THE COURT: I am going to sustain an objection to that question as put.

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Q What was in your mind about what was going to happen about the capital balances of Gross, Bleich, and Donahue?

A Well, the best I can recall what my state of mind was five years ago was that the corporation had acknowledged on the books, or was acknowledging on the books, a debt to the capital accounts of these three people and was accruing on their books a liability position for these three people. It further was noting that the corporation had some claims against these three people, and I believe, in fact, in the audited statement that was done some three or four months later by Peat, Marwick in the spring of 1971, that that was set out very clearly what the corporation's position was, that there was a capital position on the books, a liability, and that there was also pending litigation between the parties. That's my recollection.

MR. SHAW: I would like to object on behalf of the corporation. That is admissible solely with respect to Mr. Kayne and his understanding In fact, what occured may be quite different from his understanding.

THE COURT: I will permit that. It would be binding against him only at this point.

Q So that on February 11th, you understood that the corporation was going to assert certain claims against Gross, Bleich and Donahue; is that correct?

A I didn't say that. I said I thought that on February 11th there were claims against that capital account. I did not know if it would be asserted or whether the negotiations that had gone on with Gross, from the previous couple of weeks, were continuing on and in the following two weeks it would be settled. The urgency of February 11th, that being the closing, was that the New York City Stock Exchange would put the firm out of business the next day. I don't think the closing was done that day with regard to Gross, Bleich and Donahue. I think my understanding was that it was just going to continue discussions -- we are going to go on with those people -- and there was going to be some kind of understanding. This was my state of mind on February 11th.

Q On February 11th you were aware of the Buckley claim, were you not?

A I don't recall.

Q You authorized suit to be brought on the Buckley claim, did you not?

MR. SILFEN: Objection. There is no such testimony to that effect. The testimony was quite to the negative.

You may answer.

A No, sir. I don't believe I did, but I don't recall. I may have.

Q You were a member of the Board of Directors of the corporation, wereyou not?

A Yes.

Q You were the chief executive officer?

A Yes, sir.

Q The corporation authorized finally action to be brought on the Buckley claim, did it not?

A Yes, sir.

Q You were involved and participated in the action by the corporation, did you not, and authorizing Finley, Kumble to start the suit?

A As I said, sir, I don't believe so, but I may have, but I do not believe so.

Q Is it your testimony that Risher and Muh did this without your knowledge and consent?

A It is my testimony that I don't believe I authorized it. I believe that they would have talked to me if they did and told me it was a good claim that I probably would have consented and gone along with it. The legal officer for the firm, Mr. Berkowitz, was in New York. Mr. Risher and Mr. Muh were in New York. As far as I am concerned, if the three of them would have talked to me and I heard Mr. Risher say he believes it was authorized at an executive meeting -- if it was and I was on the phone or if I was consulted, if I was not out of town at that meeting, I would have gone along with it.

Q You say you just don't remember?

A I said I believe I didn't authorize it or didn't have knowledge prior to it being brought, but I don't remember. I was in California and I don't remember.

Q There came a time when you learned of the action against Gross, right, that had been taken by the corporation?

A Yes. There came a time.

Q About when did that time come? How long after the action was started?

A I think it was some time later, quite a ways later.

Q Weeks? Months?

A Months.

Q When you learned you did not disassociate yourself with that action, did you? You did not say, "How could you do this without my authority?"

A That's correct. I did not.

Q When you learned of it, you ratified and approved whatever action had been taken if you didn't specifically authorize it in the first instance; is that correct?

A I did not think it was an improper corporate act to take.

Q You said that on February 11th you knew there were these offsetting claims against Gross, Bleich and Donahue, and you assumed that negotiations would continue in an effort to reach a settlement; is that correct?

A I knew there were claims of offset alleged by various people against Gross, Bleich and Donahue.

Q Which the corporation now was purported to own; is that correct?

A Yes. I assumed that.

Q Therefore, you also knew that if negotiations were not successful there would have to be some other way of settling those disputed questions; is that correct?

A I don't believe I gave it a lot of thought that evening. The one thing I remember that evening was the limited partners wanting to insist that no settling be made with Gross without their approval, and that was when the question of claims came up, and there was a paper passed around or initiated between the corporation and those limited partners, that there was a committee set up that had approved this negotiation, and I think that hearing, that was the time when I really felt that these people had real substance in their claims. That was at a closing, and they set up a committee of distinguished people to approve a settlement.

Q Who were the distinguished people to approve that settlement?

A I think they were two attorneys representing the limited partners, as best as I can recall.

MR. SHAW: We have gone into this, your Honor.

Q So that you knew on February 11th that Gross, Bleich and Donahue wouldnot be paid by the corporation the full amount of their capital sums, but that there would be negotiations and possibly litigation?

A No, sir. I didn't know they would not be paid their full sums.

MR. MANDEL: I have no further questions.

REDIRECT EXAMINATION

BY MR. SILFEN:

Q Mr. Kayne, you may recall that on Thursday afternoon of last week Mr. Mandel asked you about conversations that you may have had with Mr. Persky during the month of December, 1970. Do you recall that type of question?

A Yes, sir.

Q Do you recall any such conversations other than the conversations that Mr. Mandel asked you about that took place between Mr. Persky and yourself during that month?

A As I testified, I believe that one or two of the -- I had talked to Mr. Persky one or two times during that month, and one of the times was when his wife Marilyn called me to ask how things were going with my wife and myself, and then she handed the phone to Persky and I talked to Persky.

Q Mr. Mandel also asked you some questions about that McDonnell lawsuit; do you recall that question or those questions regarding that lawsuit?

A I think the only question he asked me was if I was ever in any litigation.

Q You were a plaintiff in that lawsuit?

A Yes.

Q How many other plaintiffs were there in that lawsuit, if you know?

A In our lawsuit against McDonnell, there were five others.

Q Did you have a voice or did you participate in the selection of the attorneys that represented the plaintiffs in that lawsuit?

A No.

Q When for the first time, if at any time, did you ever meet with those attorneys or attorney who represented the plaintiffs in the McDonnell lawsuit?

A I think I met the attorney once before on a more sociable matter, but I think it was not until much later that I ever met with him, and I don't know if I ever discussed with him any of the substance of that lawsuit.

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Q What was the final disposition of that lawsuit, if you know?

A It was a judgement rendered against the

New York Stock Exchange, McDonnell & Company, and several individuals in that lawsuit, named defendants, in excess of $75,000 and I believe the New York Stock Exchange has already paid its amount.

Q Where was the lawsuit being prosecuted, if you know?

A I believe it was the Federal Court in California.

Q Mr. Mandel also showed you and has introduced into evidence a questionnaire which you filled out in connection with your employment at Newburger Loeb which, I believe, has been marked as defendant's Exhibit Quintuple B in evidence. I would like you to look at the item numbered one on that exhibit where it indicates what your net worth was as of the date that you executed that questionnaire. Do you see the figure $300,000?

A Yes, sir.

Q Could you tell the Court and the people assembled how that net worth is calculated, if you know?

A To the best of my recollection it involved properties that I was developing with my father. We were developing a shopping center and an industrial park at the time. My liquid net worth is relatively low.

Q How much was your liquid net worth on that date, if you can recall?

A I don't think it was in excess of 10% or $15,000.

MR. SILFEN: No other questions.

MR. SHAW: I have a few questions.

MR. MANDEL: May I interrupt for a second? I neglected to put in an answer to an interrogatory. With the indulgence of the Court may I do this?

THE COURT: Yes.

MR. MANDEL: This is Mr. Kayne's answer to interrogatories sworn to on February 3, 1975.

Interrogatory Number 20: Were you represented by an attorney in connection with negotiations and execution of the transfer agreement? If so, please name each such attorney.

Answer: Robert Persky of Finley, Kumble, Underberg, Persky & Roth.

THE COURT: Go ahead, Mr. Shaw.

RECROSS EXAMINATION

BY MR. SHAW:

Q Mr. Kayne, Mr. Mandel asked you a question dealing with Mr. Gross' capital account in which he referred to the fact that Mr. Gross had put in an excess amount of capital, and that this was the reason why he had a positive capital figure in a certain amount. I believe you answered yes. Is that the only reason why Mr. Gross' capital account was whatever the figure showed it to be in that sum? Pause to think about that for a moment, and then I will ask you some questions on the subject.

A I would have to say if he had more money in there -- he would have capital left over whether it would be excess or regular capital. I don't think the distinction of what was left in his capital account was a question of excess or other.

Q Isn't there another reason among many reasons why Mr. Gross' capital account was the size it was? I am specifically directing your attention to the back office losses sustained in early 1970 for the years '68 and '69 and the adjustment made between the partners. Can you recall that?

MR. SILFEN: I object, your Honor.

THE COURT: I will sustain that.

MR. SILFEN: The reason I object, it has to do with this procedural problem we are involved in. I ask something on redirect and response to questions Mr. Mandel asked and now this seems to be something --

THE COURT: I don't see that this --

MR. SHAW: This was brought out by Mr. Mandel and the witness answered the question in a way that I think is misleading only because I feel he has not been pointed to a certain fact.

THE COURT: It seemed to me Mr. Mandel asked certain questions to draw a comparison between Mr. Kayne's capital in, and Mr. Gross' capital in, and trying to draw an inference that they were both roughly about the same position, both having plusses into the company and really nothing more than that. I didn't gather any more than that was intended.

MR. SHAW: Mr. Mandel brought out the fact that according to Mr. Mandel having put in an excess of committed capital, Mr. Gross' capital account was higher than the other partners, higher than some partners who were in deficit capital position. The only thing I would like to establish and maybe I can do it through argument, or offer of proof, is that the reason for this involved an adjustment between the partners so that Mr. Gross' capital account was not made to bear proportionately the back office losses for 1968 and 1969 which were distributed unevenly. In other words, the partners made an adjustment.

THE COURT: Are you going to be able to establish this through Mr. Kayne?

MR. SHAW: I would like to be able to inquire because I think the entire issue in this case is the ability of partners to make adjustments between one another, and it reflects also into the issue as to what the nature of the capital account is.

MR. MANDEL: May I be heard?

MR. SILFEN: I still object.

THE COURT: I sustain the objection.

MR. SHAW: When may I ask the question?
Do I have to call this witness?

THE COURT: You have a number of ones reserved already.

MR. SHAW. I will add that to it.

BY MR. SHAW:

Q In response to Mr. Mandel's questions you indicated that there was an acknowledgement of liability made by a corporation of a sum owed to Mr. Gross, Bleich and Donahue. Can you remember being asked those questions by Mr. Mandel a few minutes ago?

A Yes.

Q Did the corporation set up a reserve of a certain sum in relation to Gross, Bleich and Donahue?

A To my knowledge, they did.

Q Was the setting up of that reserve something you knew about?

A I don't believe I knew about the specific amount. I do believe I was aware that there was a reserve being set up.

Q Did you know that the reserve was set up specifically without conceding liability and that at the instructions on behest of the City of New York Stock Exchange without conceding liability?

MR. SILFEN: I object. It is beyond the scope of the redirect.

THE COURT: Sustained. It has been established from earlier testimony, Mr. Shaw.

Q You indicated in response to Mr. Mandel's questioning this morning that it was your view that there would be negotiations with Mr. Gross, Bleich and Donahue in an attempt to resolve what, if anything, was owed to them, and if the negotiations failed that there might be litigation, correct?

A I would say this was my state of mind, yes.

Q Were those negotiations an effort to determine the amount, if any, of a capital account?

MR. SILFEN: I object, considering the witness said he didn't participate and his knowledge of those negotiations all came as a result of his secondary sources.

I object. It is beyond the scope of the redirect.

THE COURT: I will permit this. Overruled.

A My understanding was that that was part of the negotiations, and the second part would be the form in which it would be paid.

Q Were you involved in any way in those negotiations?

A No.

Q Nobody reported anything to you about the negotiations?

A No.

MR. MANDEL: It has not been established that there were any negotiations and, in fact, there were not. Your question is without a foundation.

THE COURT: Let's find out if the witness knows of any.

THE WITNESS: I know of several discussions that were under way where there were attempts to come to an agreement. I don't remember any of the specifics with regard to what --

THE COURT: This is after February 11th.

THE WITNESS: Yes, sir.

Q Do you know if in the course of negotiations there was any discussion with respect to whether assuming there were no offsets, what the amount of the capital account was?

MR. SILFEN: I object, again, your Honor. It is beyond the scope of redirect. These are events that took place after February 11. 1971.

THE COURT: I will sustain it on another ground, and that is that there is no showing to show that this man has a basis to arrive at a conclusion.

MR. SILFEN: I tried to point that out.

THE COURT: Unless you show some familiarity with the figures and the books we have nothing.

Q Did you ever look at the books of Newburger Loeb to see what, if anything, was shown on the books for the capital account of any of the partners?

A Yes, sir. I got the year-end --

Q I asked you about the books. I didn't ask you about the financial statement.

A No, sir.

Q Is there anything in the books of Newburger Loeb to yourknowledge which sets forth the capital account of any of the partners, including Mr. Gross, as at any point?

MR. SILFEN: Objection. He said he never saw the books.

THE COURT: That's right.

Q So your sole knowledge with respect to what if any the capital account of Mr. Gross is comes from the financial statements by Peat Marwick?

A Yes, sir.

Q Was it your understanding that that established a so-called starting point for the negotiations?

MR. SILFEN: I object to the form of the question.

THE COURT: Sustained.

Q When you saw the figure on the financial statement with respect to Mr. Gross' capital account, what did that figure mean to you?

MR. MANDEL: I object to that. I think, your Honor, we are in an improper area. I did not ask Mr. Kayne about anything that happened after the inception of the lawsuit.

THE COURT: I will sustain that objection.

Q Was it your view that any offsets that existed would be the sums of money which would be deducted from whatever the figure was shown in the Peat Marwick statement as the capital account of Mr. Gross?

A Yes. I would say yes. I never really believed that he would get more than that.

Q Was it also your view that whatever was shown in the financial statement of Peat, Marwick as the capital account of Bleich and Donahue would be what they were entitled to if there were no offsets?

A My view now?

THE COURT: Your view then.

A (Continuing.) I don't remember ever thinking about my view then with regard to them.

Q During the period around February 11th, both before and after, is it in fact true that what the corporation was attempting to do was to ascertain what, if anything, was owed to Gross, Bleich and Donahue, and if they were owed a sum of money they would receive it, and if they were not owed a sum of money they would not receive it, and if there was going to be successful settlement, fine, and if not there would be litigation? Is that a fair characterization of what was on your mind?

A Yes. That was my understanding.

Q Was it ever your view that through baseless litigation or through legal maneuvering you would not take one penny from Gross, Bleich or Donahue that they were entitled to?

A No.

MR. GRUTMAN: I have a few questions.

RECROSS EXAMINATION

BY MR. GRUTMAN:

Q During the time you were in the Newburger Loeb partnership, was there a man by the name of Adolphus Roggenburg?

A Yes.

Q Did he resign prior to Mr. Gross?

A I don't recall. There were two Roggenburgs. Adolphus was the father. I don't recall when he resigned.

Q Do you recall when he resigned he had capital in the firm larger than Mr. Gross?

A He had a substantial amount of capital.

Q In answering some questions that Mr. Mandel put to you this morning, you used the phrase "excess capital versus committed capital." Do you remember answering those questions and using those phrases?

A Yes.

Q Was committed capital that amount of capital which a partner was required to maintain in the firm commensurate with his percentage participation in the firm's profits?

MR. MANDEL: I object to the leading question.

THE COURT: Overruled.

MR. MANDEL: It also goes to an interpretation of the agreement.

THE COURT: Let's find out why Mr. Grutman is asking the question.

MR. GRUTMAN: It is a foundation question, of course.

A The interpretation, I believe, can be taken that if a person has $200,000 in committed capital, and his capital account has gone down, you can take money from his excess capital account and apply it to the committed, and you would not have any excess capital.

Q Excess capital was good capital that a partner had in the firm which was in an amount greater than the partner was required to maintain?

A That's correct.

Q Were you familiar with the partnership agreement in the year 1970?

A Not as familiar as I should have been.

Q Were you familiar with the partnership agreement for the year preceding?

A No.

Q Do you know whether or not the concept of excess capital and how it could be removed was an idea that was new to the 1970 partnership agreement?

A Yes, it was.

Q Do you know who it was who originated the idea about excess capital and how it could be removed from the firm?

A Well, I know that when we were investing our money in the firm on the point system --

THE COURT: No. This calls for a name.

Q Do you know the person who originated the idea about excess capital as a concept and how excess capital could be removed from the firm?

A Not clearly, no.

MR. GRUTMAN: No further questions.

THE COURT: You may step down.

Is there anything further?

MR. GLATZER: Charles Sloane.

MR. SHAW: We have an attorney, your Honor, who is supposed to arrive just about at this point to testify very briefly. He is not here.

THE COURT: Start with Mr. Sloane.

MR. SHAW: When he arrives --

THE COURT: Let's save it for when he arrives.

CHARLES S. SLOANE, called as a witness, having been duly sworn, was examined and testified as follows:

MR. SHAW: I waive.

ALBERT DWORKIN, having been called as a witness by the defendant Newburger Loeb, first having been duly sworn, testified as follows:

DIRECT EXAMINATION

BY MR. SHAW:

Q Mr. Dworkin, are you an attorney permitted to practice before the Court of this state?

A I am.

Q In addition to that, are you a Certified Public Accountant?

A I am.

Q Will you briefly advise the Court of your academic and professional background.

A I have an undergraduate degree from New York University in which I majored in accounting. I have a Bachelor of Law degree from Fordham Law School. I was admitted to the bar in New York in 1946. I was first admitted as a Certified Public Accountant in New Jersey in 1939 and subsequently admitted in New York.

Q Does the name Newburger Loeb mean anything to you?

A It is familiar.

Q When did you first have anything in connection with that company?

A 1970.

Q Can you tell the Court what occured in 1970?

A In 1970, after some discussions with Mr. Charles Gross, I became a subordinated lender to Newburger Loeb.

Q Will you describe your subordinated loan.

A I made a subordinated loan of something like 6,000 shares of a preferred stock of Great Western United to Newburger Loeb & Company, for which I was to be paid four percent per annum.

Q What was the amount of the loan?

A The loan consisted of securities which had a market value at that time of approximately $200,000 I would say.

Q When did you first have any discussion with Mr. Gross about becoming a subordinated lender in Newburger Loeb?

A I would say probably within 30 to 45 days prior to the time I actually became a subordinated lender.

Q Can you give us the approximate date when you became a subordinated lender in 1970?

A I believe it was around some date in April of 1970.

Q Subsequently, were you represented by Kenneth Bialkin in the firm of Wilkie, Farr in relation to that loan?

A I was.

Q Will you tell the Court what happened in relation to the loan?

A Well, I was informed that the firm of Newburger Loeb & Company was experiencing financial difficulties; that Mr. Gross had resigned as a partner, and that unless some kind of reorganization occured it was predicted that the loan would only be repaid in part.

Q Continue.

A A plan of reorganizing --

MR. MANDEL: Your Honor, I will object to hearsay here. Mr. Dworkin said "I was informed." He does not say who. I think it is hearsay testimony.

THE COURT: Strike it out. We will take it for what his state of mind was. He has to be a little more specific.

MR. MANDEL: Although, your Honor, I do not think Mr. Dworkin's state of mind is relevant to any of the issues of this case. He is not a party.

THE COURT: Mr. Shaw, what do you intend to prove with this witness?

MR. SHAW: In relation to the subordinated loan, that he was paid back, your Honor, and he would not have been paid back but for the transfer agreement.

THE COURT: Ask him whether he was paid back and then we'll see if there is a foundation for the next question.

Q Were you paid back the amount of the subordinated loan?

A Yes.

Q By whom were you paid back?

A By Newburger Loeb & Company, Inc.

Q Were you paid back fully?

A I was.

MR. MANDEL: We are willing to concede that all of the subordinated lenders were paid back fully without conceding the relevance of that fact.

Q In addition to consulting with Mr. Bialkin in relation to the transfer agreement, did you do anything else during the period 1970 to 1971 with respect to whether or not the transfer agreement should go forward?

A There were a number of meetings and conferences in connection with the desireability of the plan from the standpoint of subordinated lenders. There was various information presented which purported to show the financial position of Newburger Loeb & Company. There were considerable areas of concern, as I recall, with respect to a good deal of that information and after, as I say, a substantial amount of discussion and a number of meetings, there was the conclusion to proceed from the standpoint of myself as a subordinated lender, to proceed with the plan of reorganization that was ultimately adopted.

Q Did you reach that conclusion yourself?

A I did.

Q Did you reach that conclusion in part upon the basis of the various meetings you attended and the financial you sought in your consultation with Mr. Bialkin?

A I am sure I was influenced by all that information.

Q Will you tell the Court the basis for the conclusion you reached?

MR. MANDEL: I think this is irrelevant. We know that Mr. Dworkin signed the agreement. He has testified that he thought it was a good idea. I don't

BY MR. SHAW:

Q What documents did you have at your disposal, and did you examine, in relation to the issue as to whether or not the transfer agreement should go forward?

A I have to speak from recollection because I have no file in support of this at this time.

Q Give us your best recollection.

A My recollection is that there were presentations of pro forma balance sheets, or balance sheets with qualifications that they may or may not be complete. There were presentations of certain lease liabilities, which as I recall, were quite extensive. There were presentations of certain claims, as I recall.

But one of the principle problems, as I recall, was the question of the lease liabilities, and it was very difficult at that point to determine how short of a successful operation which would make use of the premises would be possible to realize on the remaining assets and pay subordinated lenders.

Q What facts did you rely upon in reaching your conclusion?

A The information which I just described.

THE COURT: He just answered that.

Q Would you tell the Court, based upon this information that you described, what the basis for your conclusion was.

A I distinctly recall, of course, that I attempted to marshal all of the figure information that was available as to the assets, as to the liabilities. I gave consideration to the fact that there was to be a substantial amount of additional capital available to the continuing organization in the form of a large subordinated loan by, I believe, Mr. Aixala, some such name. With that additional capital, with some appraisal that I had to make objectively of the people that were to run the organization, it was my feeling that that organization would have sufficient capital to function, and on the basis of being able to function over a period of time I concluded that they probably would be able to cover their rent obligation and absorb that, as realizing on the remaining assets during the continued period of the subordination they would be in a position to have a much better chance of repaying the full amount of my subordinated loan than if we were pressed to full liquidation with the lease liabilities being in a position that would, as I understood it, be superior to my position as subordinated lender. I don't recall the evaluation of superior claims, But I do have some recollection that there was a lease liability that loomed very large, that there would be very substantial creditors. I seemed to think there was a consideration as to whether they would have a priority.

Q Did you have an opinion at the time, based upon the information that you told us about, as to what would have happened insofar as your subordinated loan if the transfer agreement did not go forward?

A It was my feeling that if the transfer did not go forward I would lose a substantial portion or all of my loan.

Q I just wanted two additional points.

Are you familiar with the financial statement prepared by Peat, Marwick for the year ending December 31, 1970?

A I am not familiar with that.

Q Are you familiar with efforts made in behalf of Newburger Loeb & Company to recover from New York City certain tax sums?

A I am.

Q When did you first become familiar with those efforts?

A I was retained by Newburger Loeb & Company to press the claims.

Q When were you retained?

A I believe that was probably shortly after the reorganization that occured.

Q I show you these documents and I ask you if you recognize these as claims for credit or refund made on behalf of Newburger Loeb & Company to New York City and the State of New York for the years 1967 and 1968?

A I believe I prepared these.

MR. SHAW: I offer them in evidence.

MR. GRUTMAN: No objection.

(Plaintiff's Exhibit 124 marked for identification.)

XX

MR. MANDEL: I have no objection.

THE COURT: That may be received.

XX (Plaintiff's Exhibit 124 received in evidence.)

BY MR. SHAW:

Q Mr. Dworkin, will you tell us what action was taken by New York State and New York City with respect to those claims.

A New York City has taken no action with respect to the claims beyond acknowledging receipt. New

York State has taken the position that they would be required to deny the claims.

Q As of this point has Newburger Loeb & Company received any money with respect to any of those claims?

A They have not.

Q Do you have an opinion as to whether it would have been proper from ordinary and accepted accounting procedures to include as an asset of Newburger Loeb for the year ending December 31, 1970 those claims for refund?

MR. MANDEL: I object to that because that question is not relevant to the issues of this case.

MR. SHAW: It is.

MR. MANDEL: The question relevant to the issue of this case is whether some value should have been given to that claim in computing Charles Gross' capital at the end of 1970.

MR. SHAW: First we have to find out if it is an asset and then go from there. If it is not an asset the inquiry is over. Mr. Mandel can bring this up on cross examination.

Mr. Lauterbach testified in a certain way and the issue is here for us, and I think we should hear

BY MR. SHAW:

Q Have you practiced accountancy?

A I have practiced public accounting in New York State since 1945.

Q Are you familiar with financial statements?

A I am.

Q Are you familiar with the financial statements of Newburger Loeb & Company?

A I have seen the financial statement of Newburger Loeb & Company, the partnership.

Q Have you seen the financial statement for the year ending December 31, 1970?

A I believe I did.

Q Do you have any opinion, I ask you at this point, with respect to the propriety from an accounting standpoint of including as an asset the claim for refund of New York City and New York State taxes which you have testified to which you made with respect to 1970 financial statement?

A I find it difficult to respond to the question the way it is put.

Q In your view, is the claim for refund an asset of Newburger Loeb & Company which should have been set forth as an asset on the December 31, 1970 financial statement?

A My response is that it would not be improper to make reference to the existence of the claim in some footnoted fashion, but in view of the very substantial contingencies which became the basis for the rejection by New York State of the claim to it and which existed parallel normally in the New York City statute, I would feel it would not be proper to list the full amount of that claim in a fashion as an asset to be recognized for balance sheet purposes, although the existence of a claim might be appropriate.

Q You say it should have been footnoted?

A A footnote disclosure would be appropriate.

Q When for the first time, Mr. Dworkin, was it discussed with you that you might testify here in Court?

A I was phoned by Mr. Risher, I think, approximately a week ago. As to the specific appearance today, I believe Mr. Risher phoned me on Friday.

Q One further question:

In the course of your testimony you indicate that Mr. Charles Gross spoke with yoy about 30 to 45 days prior to your becoming a subordinated lender of Newburger Loeb, which, I believe, you said took place

to Mr. Sloane.

THE COURT: They are two different people in two different situations.

MR. SHAW: It is a similar issue.

THE COURT: I sustain the objection.

MR. SHAW: I have no questions.

MR. SILFEN: No questions.

MR. BIEHL: No questions.

MR. MANDEL: I do have a few questions.

CROSS EXAMINATION

BY MR. MANDEL:

Q Mr. Dworkin, when you were retained in 1971 to prosecute this tax refund claim, was a fee paid to you or agreed upon?

A A fee was agreed upon based upon the time that would be devoted to the matter.

Q How much has been paid to you as fee?

A I have not been paid any fee to this time.

Q How much has accrued to you as a fee?

A I have not made a calculation, frankly.

Q You have devoted a substantial number of hours, thousands of dollars of work, to this claim?

A I have not made a computation, Mr. Mandel, but I suppose that considering the time that has been devoted to this point I would not be surprised it it were a couple of thousand dollars.

Q Your effort was made in good faith in [illegible] belief there was a substantial chance of some recovery of these tax funds?

A Of course.

Q Am I right that the reason advanced by the State so far for not paying is that they say that the wrong entity or improper entity was trying to get the refund and is different from the entity, the partnership that had sustained the loss? Is that right?

A I would not say that that is correct.

Q How would you phrase it? What is the real problem?

A The position of the State is that the interests and profits and losses in the partnership in the year in which the loss was sustained, the year 1969, do not have the 80 percent concurrence with the interests of partners in the years to which we attempt to carry back this loss and achieve a refund of taxes paid in the earlier year. The statute requires that there be a 80 percent interest by partners in the year of the loss in order to carry back and achieve a tax recovery, and that demonstration under the State's position is that the same persons must be partners in both years, both of the loss year and the profitable year to which the losses carried back to the extent of 80 percent. The State says that the 80 percent test is not met in the case of Newburger Loeb.

Q You have been saying that that test is met and there is some doubt about the question?

A I have not said that the 80 percent test is met, but there is still some question open as to the final amount under the determined loss, and the federal government was making an examination. If they modified the amount of the loss to 80 percent, it might be met. There was some other collateral questions.

Q It is a complicated question, right?

A It has compliactions.

Q It has been complicated since you started with it since 1971?

A I'm not sure I understand the implication of the word "complicated."

Q In striking a balance of what should be paid to a withdrawing partner for losses occured during 1970, in your opinion, going back to 1971, would it be proper to disregard this potential asset?

A It would be most difficult to quantify.

Q What I am asking you, Mr. Dworkin, as of 1970 this possible refund was a subject of some contingency, but it was a matter of some potential value; is that right?

A Yes.

Q What I am saying to you is that as of 1971, early 1971, if you had to strike a balance between partners with regard to losses for the year and with regard to what is available, this asset should equitably be given some recognition rather than disregarded; is that right?

A Are you asking for my opinion?

Q Yes.

A In my opinion, I would not place a dollar value on that claim.

Q You would treat it as worth zero?

A I would treat it as having some potential value but not one I could quantify to a dollar value.

Q Therefore, what would your conclusion be about striking a balance between partners?

A If the question could be left open to a determination of the amount that could be received, and adjustment made between the parties, I think that would be the most equitable way.

Q If the question could not be left open,would the asset be subject to some evaluation like all other assets were, unascertainable numbers?

MR. SHAW: Objection, your Honor. This is the third time it is being asked.

A In the sense that any contingent claim might be said to have some amount of value, even though that value might be very small. If a cash value had to be placed on it at that time, I would think that any value would be a very small value.

Q You have testified that in your opinion as a subordinated lender you would be better served by having the proposed transfer agreement go through; is that correct?

A That was my statement.

Q One of the reasons was that there was an infusion of new capital from Mr. Aixala.

A Which will permit the existing organization to continue, yes.

Q Were you aware, and did you understand, that Mr. Aixala's investment was represented to him to be of a minimal risk?

MR. SHAW: Objection, your Honor. How is that relevant?

THE COURT: Overruled.

A I had no information as to any representations to Mr. Aixala.

Q Were you aware that Mr. Aixala's investment in Newburger Loeb & Company had with it a triggering provision so that he would get his money out immediately if the net worth was below $75,000?

A I believe I recall that provision.

Q You were aware of that?

A Yes. I don't recall the specific number, But I believe there was such a provision.

Q You are aware that the limited partners never got back a penny of principle as a result of the transfer agreement?

A I am not aware.

Q You are aware that under the terms of the transfer agreement the limited partners were required to release whatever claim they might have against the general partners for return of their capital? Are you aware of that?

A I have no special knowledge of that, Mr. Mandel.

Q Were you aware that under the terms of the transfer agreement a half million dollars worth of debts owed by certain general partners was released by the limited partners, by the other general partners?

A I don't recall that. At the time I may have had some knowledge, but I don't recall.

Q As of today in evaluating the situation you do not recall?

A That's correct.

Q The fact is you were not concerned at that time with what was fair or equitable for limited partners or for general partners. You were trying to protect your own subordinated loan and do what you thought was in your best interest; is that correct?

A Can I say yes to the second half of your question? My purpose was to protect my interest as a subordinated lender.

Q I believe you attended the closing on February 11, 1971, did you not?

A I attended the closing. If that was the date --

Q Were you made aware that the Rosenman firm that night refused to issue an opinion that the transfer agreement was properly authorized on behalf of the partnership?

A I believe I recall that there was a question as to who would issue such an opinion.

Q Did that question come up because the Rosenman firm refused to issue such an opinion?

A I have no specific recollection as to that.

Q Did you authorize Mr. Persky to issue that opinion in a position of conflict of interest?

MR. SHAW: Objection, your Honor.

THE COURT: Sustained.

Q Did you authorize Mr. Persky to issue such an opinion --

MR. GRUTMAN: He was represented by counsel in the presence of Mr. Bialkin.

THE COURT: That's what he says.

A I never authorized Mr. Persky to issue anything.

MR. MANDEL: I have nothing further.

CROSS EXAMINATION

BY MR. GRUTMAN:

Q You were represented at the closing by counsel of your choosing, namely Messrs. Lewis and Bialkin of the Wilkie, Farr firm; is that correct?

MR. MANDEL: One moment, please. Mr. Bialkin was not present.

Q There was a lawyer there who represented you, is that correct? Whatever he did on that night was with your approval, was it not?

MR. MANDEL: I object to that question.

THE COURT: Sustained.

Q Do you know that your counsel at the closing accepted the opinion letter which was drafted by Mr. Persky?

A I have a clear recollection that Mr. Persky did furnish an opinion letter. As to these details of authority I have no recollection.

Q Did you hear anybody object to the opinion letter which Mr. Persky drafted?

A I would not remember enough to be able to answer your question.

Q Is your recollection clear or hazy as to the circumstances as to how it came about that Mr. Persky was requested to prepare that opinion.

MR. MANDEL: I object.

THE COURT: Sustained.

Q Did you recollect the circumstances under which it was Mr. Persky that delivered the opinion of the Finley, Kumble firm?

A My recollection is that Mr. Persky was the prime mover in connection with this transaction and, therefore, I assume that in the course of the actions that he took he took such actions as he felt were appropriate.

Q Do you know how after the Rosenman firm did not deliver the opinion it came about that Mr. Persky was the one who drafted the opinion?

MR. MANDEL: The question has been asked and answered.

MR. GRUTMAN: I have not a complete answer yet, your Honor.

THE COURT: I will permit the question.

A I don't know.

Q Do I understand correctly, Mr. Dworkin, that you have had no connection or relationship, professional or otherwise, with the Finley, Kumble firm? Is that right?

A I believe I am in an investment position that certain of the memebers of their firm are also in a relatively minor nature, but aside from that I have had no association or connection with any, to my knowledge.

Q You have not discussed the substance of your testimony with me or with any other lawyer for the Finley, Kumble law firm? Is that true?

A That's true.

Q Well, have you discussed the substance of your testimony with any other lawyer here?

A I have not.

Q Is it a fact that you have known Charles Gross for many years?

A I have.

Q And you have been a social friend of his?

A I have.

Q How many years does that friendship reach back?

A My social acquaintanceship probably goes back something like 15 years.

MR. GRUTMAN: Thank you very much.

REDIRECT EXAMINATION

BY MR. SHAW:

Q Mr. Dworkin, you indicated in response to Mr. Mandel's question that you were concerned with what the effect would be upon your interest in Newburger Loeb as a subordinated lender, and Mr. Mandel asked you whether you were concerned at all in substance with the interests of the general partners or the interests of the limited partners. Do you recall that being asked of you?

A I believe so.

Q In 1971, February, did you have an opinion as to the interests, if any, of the general partners in Newburger Loeb was?

A I don't think I formulated any such opinion.

THE COURT: The answer is you did not.

Q You did testify, I believe, that you were of the view that if the transfer agreement did not go forward there would be an adverse affect on your status as a subordinated lender, correct?

A I believe I testified that I thought there was a substantial possibility, of course.

Q Of not getting the money?

A That's right.

Q Did you have an opinion as to what would have happened to the capital account or interest of any of the general partners at that time if the transfer agreement did not go forward?

A I certainly believed if the subordinated lenders would sustain a loss that the partners would not receive distributions.

Q Would it have been possible for subordinated lenders to have sustained a loss and any of the general partners to have received a distribution?

A Not unless there was specific agreement to that effect.

Q Is that also your position insofar as what would have happened insofar as limited partners were concerned if the transfer agreement did not go forward?

A I see no difference.

Q They would not have received anything either, correct?

A If we, as subordinated lenders, did not receive the full amount of our loans, I would expect the limited partners would not receive any distribution.

THE COURT: You thought you had a substantial possibility of loss; that's the way you phrased it?

THE WITNESS: I did, your Honor.

Q You also used a phrase, or Mr. Mandel did, in several questions asked with respect to striking a balance with respect to the interest of a withdrawn general partner. Would you tell us what that concept, "striking a balance," means with respect to a withdrawn general partner? What do you do when you strike a balance?

A I assume that Mr. Mandel used that meaning that it was clear to him. I don't know it as a particular technical term, and therefore, I would take it in its common, ordinary usage.

Q And what is the common, ordinary usage?

A I would understand it to mean that an accounting was being drawn between the parties.

Q By that is meant what, sir?

A A determination of an amount to which one party or one side would be entitled if a party on the other side were entitled to a given amount.

Q In doing that, would it first be necessary to determine what the assets of the partnership were net of paying for liabilities?

A I find it a little difficult to respond to the question in that form.

Q What is the first thing you would do in the accounting?

THE COURT: Do we need this?

MR. SHAW: I think we do, but if you will take my statement as to what the procedure would be, then we can dispense with this witness' testimony.

THE COURT: I think everybody understands what "striking a balance" is, and "having an accounting" means.

Q One further question:

In striking a balance, would it be necessary for the general partners to ignore a claim, a lawsuit which they had against the withdrawn partner?

THE COURT: I sustain that objection.

Q Would it be possible to strike a balance if there was outstanding litigation between the partners?

A My difficulty in responding is that if there is uncertainty, the "striking of the balance," as the term is being used, would be made very difficult unless ground rules could be established. I do not think there is an automatic procedure.

Q If a balance is struck, does a partner have any right to money from the partnership?

MR. MANDEL: I object, your Honor.

THE COURT: Sustained.

Q If the balance has not been struck is it possible to determine how much a withdrawn partner is entitled to?

A How much in dollars?

Q Yes.

A I would think a specific sum would be difficult to determine without the determination of the whole.

MR. SHAW: I have no further questions.

THE COURT: We will take a recess.

(Recess.)

CHARLES S. SLOANE resumed.

CONTINUED DIRECT EXAMINATION

BY MR. BIEHL:

Q You were telling the Court before about your first relationship with Newburger Loeb & Company in the fall of 1969. Will you continue that, please?

A Yes.

I resigned from McDonnell & Company in August of 1969. Right about that time the rumblings began; they were in the process of going bankrupt and the offices were being sold off, and deals were being made with various firms were coming and acquiring various McDonnell offices. We had a productive office in Century City with a group of people I had worked with for some time who decided we would like to stay together. We decided that I would see if I could have somebody or some firm who might be interested in that time in coming in and taking over the then existing McDonnell office and the personnel. I went back to New York and had a series of appointments with a number of people at various firms, one of whom was Mr. Gross at Newburger Loeb at that time.

Q Did you make an association with Newburger Loeb at that time?

A Not necessarily. Through a series of meetings and visits and such, there was an association formed.

Q What was your relationship?

A I nearly was hired as an employee. As it turned out, Newburger Loeb was not able to buy that specific McDonnell office. McDonnell was packaging offices and they sold that office and a group of offices to Shearson Hamill. It was decided that we and Newburger Loeb would go ahead and open an office in Century City so there was space acquired in a building across the street from McDonnell's office and I came on board, and my job was to build and develop that office from scratch.

Q What time are we at at this point?

A I would say October of 1969.

Q Did you become a partner at that time?

A No.

Q You were solely an employee?

A Yes.

Q What were your duties?

A My initial duties were in building, meeting with the architects, designers, and such, and building the office; meeting the decorators, the people who were supplying out equipment, hiring personnel, initially the back office type people and secretarial help. In addition to hiring representatives. It was a matter pretty much of starting from zero.

Q Did there come a time when that work was completed and the office became operational?

A Yes.

Q When was that?

A It opened, I believe, in April of 1970.

Q Were you a partner of Newburger Loeb at that time?

A Yes, I was.

Q When did you become a partner?

A Effective the end of February, I believe, of 1970.

Q What was the size of your interest?

A I had two points.

Q What did that cost you?

A $25,000 a point or $50,000.

Q During the period after the office opened, what were your responsibilities vis-a-vis Newburger Loeb and the New York office?

A There were a number of various areas, one being Newburger Loeb was a name and while it was an old name in New York it was not a name that was known in California; so there was some public relations-type work as far as getting the name of the firm known.

In addition, there was a matter of hiring new brokers and new personnel, and there was also the matter of running and managing the office on a day-to-day basis as far as increasing production, back office problems that occured in my branch and maintaining communications with New York on an operational basis.

Q Was a system or a program worked out of maintaining communications with the New York office?

A There was no normal program, as such. We were the only branch outside of New York and I don't know how many they had in New York at that time. Some were closing down. It was not that complex a structure. It was an informal type of relationship I would say.

Q Did there come a time when you reported the activities of the California branch to the executive committee of Newburger Loeb?

A Yes. Some time during the period after which the office opened, some time that summer -- I don't know how many meetings there were. I did make a number of trips back to New York to the executive committee. I don't know how many. They were made to inform them what was happening on the coast.

Q Did there come a time in your operation of the office on the West Coast that you entered into a program cost cutting?

A Yes.

Q Tell the Court about that.

A The actual cost cutting, to the best of my recollection, began in May, I believe, in 1970, shortly after Fred Kayne and I became aware of the financials that were being suffered by the partnership. I instituted a program whereby, I believe, the total monthly savings was somewhere in the area of $8,000 by cutting back on various guarantees and other expenses. That was the first cost cutting program.

THE COURT: May of 1970?

THE WITNESS: Yes, sir.

Q Did there come a time in 1970 when you submitted a resignation to the partnership?

A Yes.

Q When was that?

A It was first submitted in October of 1970 effective the end of November, November 30, 1970.

Q Would you tell the Court what factors you took into consideration in reaching your determination to resign from the partnership?

A In August of 1970 Fred Kayne had gone back to New York and eventually became managing partner. I believe also in August of 1970 this happened: As a result of conversations with him regarding the then situation at Newburger Loeb in the light of things he had uncovered at that time, he had mentioned to me in a phone call that he was giving serious thought to resigning, and he felt that in light of that I should do the same thing and that we should go into partnership together, and I went along with the suggestion.

THE COURT: When was this?

THE WITNESS: This would have been in October of 1970.

At that time a number of liabilities that we had previously concerned about had cleared up, so we felt a little less anxious about some of those overhanging liabilities.

Q After you resigned from the partnership as a partner, did you continue to have a relationship with the partnership.

A Yes. I stayed on as the manager of the office.

Q The manager of the Los Angeles office?

A Yes.

Q Did you, in your capacity as the manager of the office, continue to have contacts with the New York office?

A On an operational basis, yes.

Q Focusing on the period after your resignation, November, December of 1970, and January of 1971, did you learn of the Buckley matter at any time during that period?

A At some time in that period, if I had to place a time I would say towards the end of 1970, I became aware of the name Buckley, and there was a claim that the firm had. This was the extent of my knowledge.

Q Do you recall the source of your information?

A No. It could have come in a phone call, speaking to Larry Berkowitz or anybody.

Q Did you learn, during that period of time, that Mr. Gross had asserted a claim to certain warrants that were owned by the partnership?

A No, I did not.

Q Did you ever learn, before the institution of the lawsuit, about a claim to the warrants?

A No. I have no recollection of knowing that.

Q You heard Mr. Kayne testify this morning of receiving a phone call from Mr. Persky and then speaking with you. Did you hear that testimony?

A Yes.

Q Is it correct that you made a phone call to Mr. Gross at that time?

A That's correct.

Q Would you tell the Court the substance of that phone conversation.

A When at the time Mr. Kayne told me of the phone call he received from Mr. Persky, I was sort of confused. I really had been hearing much of what was going on through a secretary or it was third hand, and I did not quite understand why all of a sudden Mrs. Bleich and Mrs. Donahue, who I thought were signing the agreement in December, was not signing it, and I didn't understand this whole thing that was going on in my own mind. I was confused. My relationship with Charles Gross was always, and still is, one that we have never had any word or argument back and forth. It seemed to me at that time that it was a logical thing to call him up and find out what his thinking was and what was going on, and if he was aware of what my thinking was.

I called him and told him I had heard that there was some problem with the negotiations; there had been talks with Persky at that time, and was he aware -- financially they brought me into the partnership. I was in a position where I could suffer great financial loss as a result of the partnership going under. I was concerned about my problem.

I mentioned the fact that at that [illegible] there were 30-odd employees in the Century City office, many of whom were working there, among other reasons, for representations that he had made, and would he reconsider, and what was his reason for going along, and why was he putting everybody in that position?

Q What did Mr. Gross say to you?

A He said that he was sorry for anything that might cause me, personally, onconvenience, but he felt in his own interest it was best, that what he was doing was in his own best interest.

Q Do you know that Mr. Gross has told this Court that during that long conversation you told him that you would follow him for the rest of his life and sue him until he signed the agreement?

A I heard that.

Q Did you make a statement to that effect to Mr. Gross?

A No. I never made any statement of that type. No.

Q Did you threaten during that conversation?

A No, sir. I did not want to alienate him. I called him on what I thought was a friendship basis.

Q Do you recall that you have been described as being hysterical during that phone conversation?

A I have heard that.

Q Were you? Do you recall how you felt or how you reacted during that conversation?

A I felt concerned, but I was certainly not hysterical. It was my understanding at that time that the feeling was that the deal was going to go through anyway if nobody else defected.

Q After you had that phone conversation, did you communicate the substance of it to anyone?

A To the best of my recollection, I told Mr. Kayne I had spoken to Mr. Gross and to no avail.

Q Did you speak to anyone other than Mr. Kayne?

A I did not.

Q You have heard testimony in this courtroom, have you not, about the lawsuit, and the subsequent arbitration instituted by your Mr. Kayne?

A Yes.

Q Do you remember how that came about in your meetings with the attorneys?

A To the best of my recollection --

Q Tell the Court that, please?

A Mr. Kayne came back from New York after going on vacation. He returned to California some time in December. Shortly afterwards, his wife went into the hospital for an operation. So immediately upon his return there was not too much opportunity to really sit down and talk about business-type discussions.

Some time shortly after that we got together and discussed some of the things he had previously told me when he had been in New York, and other things that were along the nature of what the situation was in New York. We felt that that time there was possible grounds for some kind of action.

We met. Our first meeting was with Bert Massing. At that meeting we gave him the partnership agreement.

Q Mr. Mandel has asked me whether you can fix a date for this meeting you are now describing.

A The first time we met? I would place that some time very early in January of 1971.

Q Had you, at any time prior to January of 1971, discussed the subject of bringing the lawsuit against Mr. Gross with Mr. Massing?

A No, I had not.

Q Go forward.

A There were one or two additional meetings beyond that. There were later meetings with their two other attorneys in addition to Mr. Massing. We reviewed the sitation telling the attorneys what had taken place as far as our relationship to various meetings and such, and some time during this time the conclusion was reached by them, they felt, there was a valid lawsuit and went on from there.

Q Mr. Mandel has asked again to fix a date to the best of your recollection as to when this meeting took place.

A Early January, but I cannot pinpoint it any closer than that.

Q Can you put it in connection or in a time reference with your conversation with Mr. Gross? Do you know whether it was before or after you spoke with Mr. Gross?

A I could not state that as a fact that I know.

Q Was that the first time you discussed any of your relationships with Newburger Loeb and Mr. Gross with Mr. Massing?

A No.

Q Tell the Court when you spoke to Mr. Massing about the relationship with Newburger Loeb generally.

A Mr. Massing was a client of mine in addition to being a social friend of mine, and on one occasion, shortly after hearing of the loss suffered by the partnership in March, Mr. Massing had asked me in the course of conversation how things were going, and I told him the firm had suffered a substantial loss in March and I mentioned the question to him about any personal liability I might have.

He said that without knowing the facts he didn't know, but there could be some possible liability as a partner in the firm.

There may have been other times on a social basis in connection with other events when I mentioned the firm is doing this or that, but I don't recall any.

Q Now we are focusing on January, 1971 and February of 1971. Do you recall ever hearing that Mr. Gross had sought employment with a company known as Rafkind?

A No, I do not.

Q Did you attend the December 30th, 1971 closing?

A No, I was not there.